# 83-1202

No.

Office - Supreme Court, U.S
FILED
JAN 20 1984
CLERK

## In the Supreme Court of the United States

OCTOBER TERM, 1983

---

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

---

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

WILLIAM A. LUBBERS
*General Counsel*

JOHN E. HIGGINS, JR.
*Deputy General Counsel*

ROBERT E. ALLEN
*Associate General Counsel*

NORTON J. COME
*Deputy Associate General Counsel*

LINDA SHER
*Assistant General Counsel*

ROBERT C. BELL, JR.
*Attorney*

*National Labor Relations Board*
*Washington, D.C. 20570*

## QUESTIONS PRESENTED

1. Whether the court of appeals acted contrary to this Court's decision in *NLRB* v. *J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969), in denying backpay to an entire class of employees covered by the Board's order because of the length of time required to determine the amounts of backpay due those employees.

2. Whether the court of appeals abused its discretion in precluding the Board from amending its December 1982 backpay specification, with the result that four named discriminatees were denied backpay to which they were otherwise entitled under the Board's order.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statute and regulations involved | 3 |
| Statement | 4 |
| Reasons for granting the petition | 12 |
| Conclusion | 19 |
| Appendix A | 1a |
| Appendix B | 3a |
| Appendix C | 5a |
| Appendix D | 7a |
| Appendix E | 9a |
| Appendix F | 11a |
| Appendix G | 53a |
| Appendix H | 65a |
| Appendix I | 106a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745 | 16 |
| *Davis* v. *Piper Aircraft Corp.*, 615 F.2d 606, cert. dismissed, 448 U.S. 911 | 15 |
| *EEOC* v. *Exchange Security Bank*, 529 F.2d 1214 | 16 |
| *Estate of French* v. *FERC*, 603 F.2d 529 | 16 |
| *Houseton* v. *Nimmo*, 670 F.2d 1375 | 16 |
| *Howey* v. *United States*, 481 F.2d 1187 | 15 |
| *Int'l Ass'n of Bridge Structural & Ornamental Ironworkers, Local 45*, 232 N.L.R.B. 520 and 235 N.L.R.B. 211, enforced, 586 F.2d 834 and 835 | 3 |

Cases—Continued: Page

*Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 373*, 232 N.L.R.B. 504 and 235 N.L.R.B. 232, enforced, 586 F.2d 835 ..... 3, 18
*Nathanson* v. *NLRB*, 344 U.S. 25 ..... 16
*National Beef Packing Co.* v. *Secretary of Agriculture*, 605 F.2d 1167 ..... 16
*NLRB* v. *J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 ..... 12, 13, 14, 15, 16, 19
*NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, cert. denied, 384 U.S. 972 ..... 8
*NLRB* v. *Sally Lyn Fashions*, 112 L.R.R.M. (BNA) 3039, order approving settlement, No. 81-1520 (3d Cir. Dec. 9, 1982) ..... 17
*NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344 ..... 13, 16
*NLRB* v. *Trans Ocean Export Packing, Inc.*, 473 F.2d 612 ..... 17
*Schnadig Corp.*, 265 N.L.R.B. No. 20 (Oct. 19, 1982) ..... 17
*United States* v. *Hougham*, 364 U.S. 310 ..... 15
*Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 ..... 15

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:
5 U.S.C. 706 ..... 16
5 U.S.C. 706(1) ..... 15
National Labor Relations Act, 28 U.S.C. (& Supp. V) 151 *et seq.* ..... 2
§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) ..... 2
§ 8(b)(2), 29 U.S.C. 158(b)(2) ..... 2
29 C.F.R.:
Pt. 101:
Sections 101.1 *et seq.* ..... 2, 106a
Pt. 102:
Sections 102.52-102.59 ..... 8, 106a-110a
Section 102.53 ..... 14, 107a
Section 102.57 ..... 15, 109a

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

---

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The orders of the court of appeals (App., *infra*, 1a-2a, 5a-6a, 7a-8a, 9a-10a) are not reported. The decision and order of the National Labor Relations Board, together with the decision of the administrative law judge (App., *infra*, 11a-52a), is reported at 235 N.L.R.B. 1511.

## JURISDICTION

The judgment of the court of appeals (App., *infra*, 1a-2a) was entered on July 27, 1983. A petition for rehearing was denied on August 24, 1983 (App., *infra*, 3a-4a). Justice Brennan extended the time for filing a petition for a writ of certiorari to and including January 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, and of the Board's rules and regulations, 29 C.F.R. 101.1 *et seq.*, are set forth at App., *infra*, 106a-110a.

## STATEMENT

Respondent, Local 480 of the International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO, operates an exclusive hiring hall in the construction industry in northern New Jersey pursuant to a collective agreement with the Building Contractors Association of New Jersey. The Board found that respondent violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and (2), by discriminating against nonmembers in its hiring hall referral practices (App., *infra*, 11a-52a).[1] Finding a widespread

[1] Under a 1972 consent decree, respondent is required to refer qualified applicants in the chronological order of their registration with the hiring hall. One exception allows more experienced applicants to be referred out of order to act as stewards at a job site " 'as may be deemed necessary or proper by the union official in charge of referrals' " (App., *infra*, 12a). The Board found that respondent had used the steward exception consistently to favor members over nonmembers in

pattern of discrimination against nonmember applicants, the Board directed respondent to make whole five named charging party employees and all "similarly situated" employees who suffered loss of earnings as a result of respondent's referral practices (*id.* at 21a). The Board's order directed that backpay be determined "under a formula whereby the overall earnings of all applicants, members and nonmembers, seeking employment through its referral system would be divided by the total number of ironworkers who worked out of the hiring hall * * *" (*id.* at 21a-22a). The court of appeals enforced the Board's order in full on May 11, 1979 (App., *infra*, 9a-10a).

Thereafter, the Board's Regional Office began the task of identifying all similarly situated employees and computing backpay amounts. This task was complicated by the fact that the instant case was one of five similar cases in which the Regional Office was required to compute backpay due to discriminatory referral practices against named and "similarly situated" job applicants by member locals of the District Council of Ironworkers for Northern New Jersey.[2] In an effort to treat all of the claimants equally and to organize the Region's compliance efforts more efficiently, the Regional Office sought at the outset to

---

the order of job referrals without a legitimate justification for doing so (*id.* at 12a-17a).

[2] See *Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 373*, 232 N.L.R.B. 504 (1977) and 235 N.L.R.B. 232, enforced, 586 F.2d 835 (3d Cir. 1978) (table); *Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 45*, 232 N.L.R.B. 520 (1977) and 235 N.L.R.B. 211, enforced, 586 F.2d 834 and 835 (3d Cir. 1978) (table).

prepare a consolidated backpay specification covering all of the locals (App., *infra*, 77a).

The only central source of wage data for respondent and the other locals was the employee wage records maintained by the Ironworkers Pension and Welfare Fund. Because of the manner in which these records were kept, it was necessary, in order to identify all "similarly situated" employees, for the Regional Office to make a detailed computer analysis of respondent's referral registers covering a period of three years (App., *infra*, 66a-67a, 74a-76a).[3] This analysis required a line-by-line inspection of several thousand pages of referral records in order to determine an employee's sign-up date, qualifications and union affiliation, and to compare the

---

[3] In a letter to the Region in February 1979, counsel for the Fund stated that the Fund would produce the necessary wage information without a subpoena as long as the local unions did not object. Counsel for the Fund explained (App., *infra*, 68a (emphasis omitted)):

> "our problem is in identifying the specific ironworkers with respect to whom wage information is requested. Our records do not show what local union member affiliation a particular ironworker may have nor do we know from what Union hiring hall he may have been referred for a given job. However, if you will provide us with names and time periods we will make available whatever information you may request, provided no objection has been registered with respect to such disclosures from the attorneys representing the local unions in these cases. Should there be objections, we request that our instructions be embodied in an Order of the Court.

In letters to the Region on January 18, 1980 and December 21, 1982, respondent stated that it had no objection to the production of Fund records (Exhibit B to Respondent's Second Motion for Relief 2; Exhibit E to Respondent's Third Motion for Relief 1-2).

information on nonmember employees with that on member employees who were referred ahead of nonmembers. Respondent refused to permit the Region to photocopy its referral registers for use in the computer analysis until October 1980, after the Board had instituted contempt proceedings against two other locals that also had refused to permit photocopying of relevant records (*id.* at 74a-75a). Thus, during the early stages of compliance, the Board's agents were forced to copy the referral records by hand.

The Region contracted with the General Services Administration (GSA) to perform the computer analysis, and by February 1981 the analysis had identified all of the nonmembers who had applied for work through respondent's hiring hall during the relevant period (App., *infra*, 83a, 88a-89a). Upon receiving the data from GSA, however, the Region discovered that GSA's subcontractor had made a major keypunching error that caused GSA's analysis to overlook as many as half of the incidents of discriminatory referrals required to identify all nonmember discriminatees and to determine the amounts due them (*id.* at 83a). Correcting the GSA error required that new data cards be keypunched and reprocessed (*id.* at 85a). GSA refused to correct the error and complete the project, however, unless the Board paid an additional $10,000 (*id.* at 83a-84a).

The Region called a meeting in October 1981 with respondent's attorney and other representatives of locals involved in the Ironworkers cases to discuss a more expeditious resolution of the backpay remedy. The Region suggested that possible settlement proposals might include a lump sum payment to be divided among discriminatees, installment payments,

or possibly waiver of dues and fees for discriminatees over a period of time. Noting that settlement proposals should be based on the locals' ability to pay, the Region requested that respondent provide it with financial data reflecting its ability to meet the terms of a possible settlement (App., *infra*, 79a; Exhibit E to Respondent's Second Motion for Relief 1). Respondent's attorney stated that he would discuss settlement methods with his client and, on that basis, further work on the computer analysis was held in abeyance (App., *infra*, 84a).

Having received no response by January 1982, the Region again communicated with respondent regarding settlement (Exhibit E to Respondent's Second Motion for Relief 1). Respondent replied by letter of January 27, 1982 that "[i]t has long been [respondent's] position that the broad provisions of the present [backpay] orders render them, in effect, unenforceable * * *. It should also be noted that, at least from [respondent's] perspective, no immediate resolution of this issue is even remotely in sight" (Exhibit F to Respondent's Second Motion for Relief 2). Respondent did not agree to any of the proposed settlement methods and refused to provide financial information, suggesting instead that the Region consult documents on file with the Department of Labor (*id.* at 3; App., *infra*, 79a).

The Board thereafter authorized expenditure of the additional funds required to complete the computer analysis and calculate backpay. On April 21, 1982, respondent filed a motion in the court of appeals seeking relief from the court's May 1979 order insofar as it enforced that portion of the Board's remedial order directing backpay for "all other nonmember applicants who were similarly situated." Respondent contended that the Board's delay in deter-

mining backpay for those individuals rendered that portion of the order "unenforceable." The court of appeals summarily denied the motion on May 13, 1982, "without prejudice to renew such motion after 90 days if the situation is not clarified by then" (App., *infra*, 8a).[4] Shortly before the court issued this order, GSA informed the Region that, because priority had been given to another program over the Board's backpay program, work on the Board's program would be delayed until July. GSA's data processing subcontractor then told the Region that a planned change in computer systems would delay resumption of the analysis until October 1982 (*id.* at 90a). The Region, after considering the additional cost and start-up time of using another contractor, decided to keep the work with GSA.

On September 29, 1982, respondent filed a renewed motion for relief from the "similarly situated" portion of the backpay order, again on the ground of the continuing delay. In opposing respondent's motion for relief, the Board's General Counsel summarized for the court the history of the Region's efforts to identify all discriminatees and compute backpay amounts, including the delays caused by GSA and its subcontractors. The General Counsel explained those steps still to be performed and estimated that a backpay specification based upon actual earnings information for all named and similarly situated discriminatees would be completed by April 1983 (NLRB

---

[4] Neither the Board's General Counsel nor the Regional Office has any record of having received notice of the court's May 13, 1982 order. The Board was not made aware of it until it was attached as an exhibit to respondent's renewed motion for relief, filed in September 1982 (App., *infra*, 92a; Exhibit D to NLRB Memorandum in Opposition to Respondent's Second Motion for Relief).

Memorandum in Opposition to Respondent's Second Motion for Relief 4-8). On December 1, 1982, the court of appeals issued an amended order setting a "termination date of December 31, 1982, for entering a formal back pay specification in connection with the proceedings to obtain back pay" (App., *infra*, 5a-6a).[5]

In response to the court's order, the Region distilled from the consolidated ironworkers' data (intended for use in the consolidated backpay specification that the Region had planned to issue in April 1983) a separate list of Local 480 discriminatees as well as other employees who used the hiring hall during the relevant period. The Region then contacted the Pension and Welfare Fund, explained the necessity and urgency of obtaining access to the Fund's wage records in view of the court's deadline, and requested the relevant records (App., *infra*, 66a-67a). On December 9, the Fund changed its prior position with respect to providing earnings information (see note 3, *supra*) and refused to produce any records

---

[5] The court originally issued an order on November 12, 1982, placing "a termination date of December 31, 1982 on the proceedings to obtain back pay." Upon the General Counsel's motion to clarify the order, the court issued its amended order directing only that the formal backpay specification be entered by the deadline.

As set forth in the Board's Rules and Regulations governing backpay proceedings, 29 C.F.R. 102.52-102.59 (App., *infra*, 106a-110a), a backpay specification is merely the formal commencement of the administrative backpay compliance proceeding. Under the Board's regulations, a respondent in such a proceeding is entitled, through a formal hearing before an administrative law judge, to contest all amounts claimed to be due in the specification, and thereafter to seek full Board and court review of the final backpay determination. See *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966).

without a subpoena or court order, notwithstanding the lack of objection to production of the records by respondent (*id.* at 67a-69a).

Faced with the possibility of protracted litigation to enforce a subpoena for the Fund's records in the face of the court's deadline, the Region prepared a backpay specification based on the actual earnings information that it had available and projections of the earnings of those whose records the Fund refused to provide. On December 21, 1982, in compliance with the court's deadline, the Region issued a formal Backpay Specification and Notice of Hearing covering the named charging parties and 131 similarly situated discriminatees (App., *infra*, 94a-99a). Pursuant to the Board's rules and regulations, the hearing in the backpay proceeding was set for May 16, 1983 (*id.* at 99a).

Subsequently, pursuant to an investigatory subpoena issued by the Board, the Region obtained the Fund's earnings records and recomputed respondent's backpay liability based on that information. On February 18, 1983, the Region met with counsel for respondent and informed him that the Region planned to issue an amended specification based on the complete earnings records it had obtained (App., *infra*, 71a). On February 25, respondent filed a third motion for relief from the original backpay judgment (*id.* at 53a-55a). In support of its motion, respondent contended that the December specification failed to comply with the Board's original backpay order and the Board's rules and regulations because it did not include complete actual earnings data, and that "'any backpay specification which is not in full accord with Board Rules and Regulations [is] contumacious of the outstanding Third Circuit Order'" (*id.* at 62a (citation omitted)). Respondent also

contended that the December specification was "punitive" because the total estimated liability exceeded its ability to pay (*id.* at 63a). Respondent requested that the court either terminate the backpay proceedings or modify its enforcement order to exclude any requirement of backpay to the similarly situated employees.

The Region issued an amended specification on March 11, 1983, alleging total liability for backpay and interest of approximately $900,000 (App., *infra*, 100a-105a).[6] In opposing respondent's third motion for relief, the Board again summarized its efforts to identify and compute backpay for all similarly situated individuals, and the resistance it encountered from respondent and the Fund. The Board explained the steps it took to prepare both the December 1982 specification and the amended specification,[7] and

---

[6] In a supplemental affidavit in support of respondent's third motion for relief, counsel for respondent alleged that issuance of the amended specification "confirms * * * that the December 21, 1982, pleading totally failed to comply with the Board's own Rules and Regulations" and that "the December 21, 1982 pleading * * * was merely issued to circumvent the court-imposed deadline * * *" (Supplemental Affidavit in Support of Respondent's Third Motion for Relief 3).

[7] Because the Fund refused to provide complete actual earnings data for all employees who used respondent's hiring hall in time to prepare the December specification, the Region projected the overall earnings of all members and nonmembers based on the actual earnings information that it did have. Pursuant to the Board-prescribed backpay formula, the Region then divided the projected overall earnings by the total number of employees who worked out of the hiring hall to arrive at the amount the employees should have earned absent the discrimination. App., *infra*, 71a-72a.

The amended specification, in addition to recomputing all figures using actual earnings, which resulted in an overall reduction of approximately 25% to 30% from the December

noted that, under the Board's rules and regulations, respondent's objections to the specification would properly be addressed in the formal backpay proceeding. The Board contended that a decision by the court to modify its outstanding backpay order based on respondent's objections to the specification "would be * * * premature and would result in a misallocation of the respective functions of the Board and the reviewing court" (NLRB Memorandum in Opposition to Respondent's Third Motion for Relief 17).

On April 18, 1983, while respondent's motion for relief was pending, the parties began settlement discussions after a conference called by Circuit Judge Adams. Settlement efforts proved unsuccessful and counsel so informed Judge Adams at a conference on June 30, 1983.

On July 27, 1983, the court of appeals issued an order relieving respondent from backpay liability for all "similarly situated" discriminatees and striking the Board's amended specification (App., *infra*, 1a-2a). The order states (*ibid.*):

> [A]fter a review of the various orders entered in this matter, and the length of time that elapsed since the entry of the original judgment of this Court, it is ordered that:
>
> 1. Any backpay specifications not made by December 31, 1982, are hereby barred

---

specification, corrected a mathematical error in the original specification that resulted in an understatement of the amounts due the named charging parties. Their claims totaled only about $7,700 in the December specification (see *id.* at 63a), but, as now reflected in the amended specification, the charging parties are actually entitled to a total of approximately $17,300, excluding fringe benefits and interest (Appendix E to Amended Backpay Specification E-25, E-26, E-31 and E-105).

and are not to be considered. See order of court dated December 1, 1982.

2. Payment in full by the Union of any claims asserted on behalf of Ronald Cron, Robert Dailey, Daniel Dietz, and Walter Serafin [8] shall be considered compliance with paragraph 1 of this order.

The Board filed a petition for rehearing en banc of the court of appeals' order. In its petition, the Board argued that the court's order is contrary to this Court's decision in *NLRB* v. *J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969), because it effectively penalizes the injured employees on account of the Board's delay in issuing the amended backpay specification.[9] The petition for rehearing en banc was denied (App., *infra*, 3a-4a).

## REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals denying backpay to all similarly situated discriminatees because of the length of time required to determine the amounts due them is directly contrary to this Court's decision in *NLRB* v. *J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969). Accordingly, we believe that summary reversal is warranted.

In *Rutter-Rex*, the Court held that a court of appeals' decision eliminating or limiting backpay for employees otherwise entitled to it because of delay in

---

[8] These were four of the named charging parties; no backpay was due the fifth charging party.

[9] The Board had cited the *Rutter-Rex* decision in several of its previous filings in the court of appeals. See NLRB Supplemental Memorandum in Opposition to Respondent's Second Motion for Relief 1-2; NLRB Memorandum in Opposition to Respondent's Third Motion for Relief 13-14 n.6.

issuing a backpay specification improperly penalized the innocent employees and "exceeded the narrow scope of review provided for the Board's remedial orders" (396 U.S. at 266). There, because of the complexity of the task and the heavy caseload of the Board's Regional Office, more than four years had elapsed from the time the court of appeals enforced the Board's remedial order until issuance of the backpay specification (*id.* at 260-261). The court of appeals found that the delay was "inordinate" and modified the Board's order to provide an earlier cut-off date for backpay, thereby reducing the awards to a number of employees (*id.* at 262).

In reversing the court of appeals, this Court stated that, "[a]s with the Board's other remedies, the power to order back pay 'is for the Board to wield, not for the courts.'" 396 U.S. at 263 (quoting *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)). The Court added that "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers" (396 U.S. at 265). Although not condoning the alleged delay in the administrative process, the Court concluded that "[i]t is even more deplorable if, as seems clear, innocent employees had to live for some years on reduced incomes as a combined result of the delay and the company's [unfair labor practice conduct]" (*id.* at 265-266).

Here, due to its complexity, respondent's recalcitrance, and other factors beyond the Board's control, the task of computing backpay took three and a half years to complete. Despite the teaching of *Rutter-Rex*, the court of appeals, by excluding the similarly situated discriminatees from the Board's backpay

order, in effect held that innocent employees who suffered losses from respondent's unlawful conduct must bear the cost of the delay. Accordingly, here, as in *Rutter-Rex*, the court of appeals' action plainly "exceeded the narrow scope of review provided for the Board's remedial orders." 396 U.S. at 266. Indeed, since an entire class of discriminatees was denied backpay, the lower court's error here was even more egregious than that in *Rutter-Rex*, which merely involved a reduction in the amount of backpay awarded to each discriminatee.

2. In addition, under the circumstances of this case, the court of appeals' decision to forbid amendment of the December 1982 backpay specification, with the result that four named discriminatees received less backpay than they would have been entitled to under the Board's order (see note 7, *supra*), was "an unwarranted interference with the Board's remedial power to implement the policies of the * * * Act" (*Rutter-Rex*, 396 U.S. at 259). The court of appeals' December 1, 1982 order required only that formal backpay proceedings commence with the issuance of a specification by December 31, 1982. Despite the unwarranted failure of the Pension and Welfare Fund to cooperate in the face of the court's deadline, the Board complied with the court's order by issuing a specification on December 21, 1982. As the court of appeals recognized, however, a backpay specification merely begins supplemental backpay proceedings by giving notice to the respondent of the amount allegedly due.[10] 29 C.F.R. 102.53. The specifi-

[10] Thus, the court of appeals clarified its order to require only that a specification issue, not that supplemental backpay proceedings be completed by December 31, 1982. See note 5, *supra*.

cation serves the same purpose as does a complaint in civil litigation, and normally can be amended in order to correct amounts claimed without prejudice to the respondent in the backpay proceeding. 29 C.F.R. 102.57. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-331 (1971); *United States* v. *Hougham*, 364 U.S. 310, 316-317 (1960); *Davis* v. *Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir.), cert. dismissed, 448 U.S. 911 (1980); *Howey* v. *United States*, 481 F.2d 1187, 1190-1191 (9th Cir. 1973).

Having complied with the court of appeals' deadline, the Board amended the specification based on the complete actual earnings data that it later obtained under subpoena from the Fund, with no delay to the proceedings and no prejudice to respondent. Indeed, the amended specification preserved the May 16, 1983 hearing date and, while increasing the amounts of backpay due four named discriminatees, actually reduced respondent's total alleged liability. Moreover, it served to refine and sharpen the backpay issues for hearing based on more complete data. The court's refusal to allow the amendment will require the Board to proceed based on amounts that are not accurate in all cases, and at no greater speed than if the amendment were permitted. In these circumstances, while a court of appeals may have power to compel Board action unreasonably delayed,[11] the

---

[11] The Administrative Procedure Act, 5 U.S.C. 706(1), empowers a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." See *Rutter-Rex*, 396 U.S. at 266 & n.3. However, the statute requires that, "[i]n making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due

court's decision to prohibit the amendment of the December 21, 1982 backpay specification was an abuse of discretion and an unwarranted interference with the Board's exclusive authority to compute and award backpay. See *Rutter-Rex*, 396 U.S. at 259; *Nathanson* v. *NLRB*, 344 U.S. 25, 29 (1952); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. at 346.[12]

---

account shall be taken of the rule of prejudicial error." 5 U.S.C. 706. This section has been interpreted by every court that has considered it to require a specific showing of prejudice before agency action can be compelled or set aside for lack of punctuality. See, *e.g.*, *Houseton* v. *Nimmo*, 670 F.2d 1375, 1378 (9th Cir. 1982); *National Beef Packing Co.* v. *Secretary of Agriculture*, 605 F.2d 1167, 1169 (10th Cir. 1979); *Estate of French* v. *FERC*, 603 F.2d 1158, 1167 (5th Cir. 1979); *EEOC* v. *Exchange Security Bank*, 529 F.2d 1214, 1216 (5th Cir. 1972); *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745, 747 (5th Cir. 1972).

[12] In its February 25 motion for relief, respondent contended that the December 21 specification did not comply with the Board's backpay order (see pages 9-10 & n.6, *supra*). Respondent is not foreclosed from raising this contention before the Board in the ongoing backpay proceeding. Thus, as shown (note 5, *supra*), respondent is entitled to contest all amounts claimed to be due in the specification and to present evidence in mitigation of the amounts due in the backpay proceedings before the Board, and thereafter to seek full judicial review of the Board's ultimate determination.

With respect to respondent's assertions also made in the February 25 motion that it cannot afford to make whole those against whom it discriminated, the Board has explained that "a respondent's ability to pay [is not] a factor in determining what, if any, remedy to impose for violations of the Act." However, if a wrongdoer "is, in fact, unable to meet its backpay liabilities currently, that is a matter to be addressed in compliance. * * * [A]rrangements frequently are made to provide a schedule of payments for respondents that are able to demonstrate an inability to shoulder their backpay liabili-

3. If left standing, the court of appeals' decision modifying the Board's backpay remedy is likely to have a substantial and harmful effect on the administration of the National Labor Relations Act. The determination of a make-whole remedy for large classes of employees is frequently a complex process, and in many cases the wrongdoing union or employer is the only available source of the data required to identify all discriminatees and calculate backpay. Despite the need for cooperation, respondents are often recalcitrant in complying with Board remedial orders, but the realization that they ultimately will be required to pay backpay acts as an incentive to cooperate. Eliminating liability to a substantial number of innocent employees on the basis of delays due to difficulties in determining amounts owed, and precluding the Board from making reasonable amendments to a previously issued backpay specification,

---

ties." *Schnadig Corp.*, 265 N.L.R.B. No. 20, at 4-5 (Oct. 19, 1982). Moreover, the Board will enter into settlements at the contempt stage. See *NLRB* v. *Sally Lyn Fashions*, No. 81-1520 (3d Cir. Dec. 9, 1982) (order approving settlement). See also *NLRB* v. *Sally Lyn Fashions*, 112 L.R.R.M. (BNA) 3039, 3053 (3d Cir. 1982); *NLRB* v. *Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973). Thus, while the Board will entertain settlement proposals at any stage of its proceedings, inability to pay is not grounds for disturbing a remedial order.

In this case the Board solicited settlement proposals as early as October 1981 (see pages 5-6, *supra*). However, it was not until May 1983 that respondent, at the request of Judge Adams, made available to the Board statements of its financial condition. Those statements revealed that respondent has liquid assets of approximately $86,000. While the Board was unwilling to agree to a judicially induced settlement at that stage of its compliance proceedings, this does not preclude the possibility of settlement at a future stage.

only encourages respondents to be more recalcitrant. Thus, unless reversed, the probable effect of the decision here will be to diminish voluntary compliance with Board orders and exacerbate the delay and difficulty in securing compliance generally, thereby disrupting the remedial scheme Congress has fashioned.

In addition, as we have shown, this case is only one of several involving discrimination against ironworkers by hiring halls in northern New Jersey. These cases involve nearly a thousand ironworkers who have lost several million dollars as a result of these unfair labor practices. The court's decision, if allowed to stand, will only encourage greater resistance to the difficult task the Region faces in making these employees whole.[13]

---

[13] Indeed, one of respondent's sister locals has filed a similar motion for relief from judgment in a case involving more than 600 ironworkers. See *Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 373, supra* (motion for relief pending).

## CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed summarily on the authority of this Court's decision in *Rutter-Rex*.

Respectfully submitted.

REX E. LEE
*Solicitor General*

WILLIAM A. LUBBERS
*General Counsel*

JOHN E. HIGGINS, JR.
*Deputy General Counsel*

ROBERT E. ALLEN
*Associate General Counsel*

NORTON J. COME
*Deputy Associate General Counsel*

LINDA SHER
*Assistant General Counsel*

ROBERT C. BELL, JR.
*Attorney*

*National Labor Relations Board*

JANUARY 1984

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 78-2014

---

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO, RESPONDENT

BEFORE: ADAMS, GIBBONS, and WEIS, *Circuit Judges*

---

ORDER

---

And now this 27th day of July 1983, after a review of the various orders entered in this matter, and the length of time that elapsed since the entry of the original judgment of this Court, it is ordered that:

1. Any back pay specifications not made by December 31, 1982, are hereby barred and are not to be considered. See order of court dated December 1, 1982.

2. Payment in full by the Union of any claims asserted on behalf of Ronald Cron, Robert Dailey, Daniel Dietz, and Walter Serafin shall be considered compliance with paragraph 1 of this order.

BY THE COURT,

/s/ Arlin M. Adams
Circuit Judge

A TRUE COPY:

/s/ Betty J. Robinson
BETTY J. ROBINSON
Deputy Clerk

Dated: July 27, 1983

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 78-2014

---

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO, RESPONDENT

(Board Case No. 22-CB-3432)

---

SUR PETITION FOR REHEARING
IN BANC

---

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*.

The petition for rehearing filed by Petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit

in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

By the Court,

/s/ Arlin M. Adams
Circuit Judge

Dated: Aug. 24, 1983

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 78-2014

---

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO, RESPONDENT

---

Present: ADAMS, GIBBONS and WEIS, *Circuit Judges*

---

AMENDED ORDER

---

The order entered on November 12, 1982 is hereby vacated and an amended order is hereby entered as follows:

After considering the motion for partial relief, and the answer thereto, and after hearing oral argument in regard to such motion, it is ordered that the order entered May 9, 1978 is hereby modified to place a

termination date of December 31, 1982, for entering a formal back pay specification in connection with the proceedings to obtain back pay.

By the Court,

/s/ Arlin M. Adams
Circuit Judge

Dated: Dec. 1, 1982

**APPENDIX D**

April 27, 1982

No. 78-2014

RE: NATIONAL LABOR RELATIONS BOARD, PETITIONER

*vs.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO, RESPONDENT

Present: ADAMS, GIBBONS and WEIS, *Circuit Judges*

1. Motion by Respondent for partial relief from the Judgment-Order entered May 11, 1979 with Memorandum of Law in Support which the Court may wish to treat as a Motion to provide for relief from the "and all other non-member applicants who were similarly situated" portion therein of the Board's Order.
2. For your information this Court's Judgment-Order was entered on May 11, 1979 and a copy is attached to the motion.

in the above-entitled case. Any Answer which would be due by April 30, 1982 will be forwarded upon receipt of same.

Respectfully,

/s/ Sally Mrvos
Clerk

enc.

bjr

The motion by respondent for partial relief is denied without prejudice to renew such motion after 90 days if the situation is not clarified by then; the present panel to retain jurisdiction.

By the Court,

/s/ Arlin M. Adams
Circuit Judge

Dated: May 13, 1982

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 78-2014

---

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*vs.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO, RESPONDENT

---

On Application for Enforcement of an Order of
the National Labor Relations Board
Board No. 22-CA-3432

Argued May 1, 1979

Before: ADAMS, GIBBONS and WEIS, *Circuit Judges*

---

JUDGMENT ORDER

---

After consideration of all contentions raised by the petitioner, it is

ADJUDGED AND ORDERED that the application of the National Labor Relations Board for enforcement of its order be and the same is hereby granted.

Each side to bear its own costs.

BY THE COURT,

/s/ Arlin M. Adams
Circuit Judge

Attest:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

Dated: May 11, 1979

## APPENDIX F

CASE 22-CB-3432

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO and JOHN A. CRANER, ATTORNEY and BUILDING CONTRACTORS ASSOCIATION OF NEW JERSEY, PARTY TO THE CONTRACT.

May 9, 1978

## DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On October 21, 1977, Administrative Law Judge Benjamin K. Blackburn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.

The issue litigated in the present proceeding was whether Respondent operates its hiring hall in a manner which discriminates against nonmembers of Local 480, in contravention of Section 8(b)(1)(A) and (2) of the Act.

In 1972, Respondent entered into a consent decree which covers in detail the procedures and criteria to be utilized in the operation of Respondent's hiring hall. At the time of the events described herein, the collective-bargaining agreement in effect between Respondent and the Building Contractors Association of New Jersey provided that the exclusive hiring hall arrangement agreed to would be operated in accordance with the terms of the 1972 decree. According to the pertinent parts of this agreement, referrals were to be made to those jobs which the applicant indicated he was qualified for in the chronological order of the applicant's registration. One exception to this basic rule was provision 27(g) which states:

> Senior, experienced applicants may be referred out of chronological sequence to act as stewards for the work crew at a particular job site as may be deemed necessary or proper by the union official in charge of referrals thereto. This shall be limited to one steward for each contractor.

The evidence in regard to the actual operation of the hiring hall indicates that both members of Respondent and nonmembers [1] are referred to area contractors, and that individuals from both groups have been referred out of chronological sequence as stewards. However, the General Counsel has presented evidence which he contends shows that referrals for the position of steward favor members of Local 480 over nonmembers in a discriminatory fashion.

---

[1] While the alleged discriminatees have been termed "nonmembers," their lack of membership is only with respect to Respondent Local 480. The referral registers in evidence show that, with one exception, all applicants for referrals were members of one of various locals of the Ironworkers.

The five named discriminatees include Walter Serafin, Edward Korab, Ronald Cron, Robert Dailey, and Daniel Dietz. All of these individuals have been continuous members of International Association of Bridge, Structural & Ornamental Ironworkers, for periods ranging from 4 to 16 years but hold memberships in locals other than Local 480. Although they all reside in the same general area as Respondent's members, they are considered out-of-town or nonlocal men. Of these five, the uncontradicted evidence shows that all except Korab have been referred as stewards by Respondent.[2] An analysis of Respondent's referral register shows that after July 12, 1976,[3] the beginning of the 10(b) period, of the approximately 110 journeymen members of Local 480 who applied for referral during this period, roughly 72 were referred as stewards on at least one occasion. By independently collecting the information contained in this register, the Administrative Law Judge found that Respondent's members were in fact referred as stewards much more frequently than nonmembers. Of the 1,036 referrals of Respondent's members, 341 of them were for the position of steward; while, of the 876 referrals of nonmember, only in 53 instances were these nonmembers referred as stewards. According to these figures, it appears that members were referred as stewards over five times more often than nonmembers.

---

[2] A copy of the referral register indicates that Serafin was referred as a steward on August 8, 1976; Dailey was so referred on November 26, 1976; and Dietz was so referred on April 23 and October 27, 1976. In addition, Cron's uncontradicted testimony indicates that he had been referred as a steward by Respondent prior to June 1975.

[3] Unless otherwise indicated, all dates occurred in 1976.

Respondent has not disputed the evidence that Local 480 members are in fact referred as stewards more frequently than nonmembers, but insists that the basis for this disparity is nondiscriminatory. Under its interpretation of provision 27(g) of the consent decree, "senior, experienced applicants" are selected according to the following criteria: (1) an applicant's experience in the trade; (2) an applicant's seniority within the International; and (3) formal training developed through an apprentice program. In justifying its preference for its members, Respondent notes that it seeks to place the most qualified applicant as steward according to these criteria and does not rely solely on specified minimal qualifications. Respondent therefore argues that the referral of an individual as steward merely indicates that he was the most qualified individual available at the time, although on other occasions another applicant would be justifiably favored over him. According to Respondent, the above-noted criteria are utilized because it is the prime responsibility of the steward to safeguard the work jurisdiction of ironworkers and to assure that adequate safety conditions are maintained. In view of these responsibilities, Respondent admits that in making the selection of a steward referral, where everything is about equal between two applicants, a Local 480 member would be chosen over a nonmember. Respondent explains that its propensity to favor members over nonmembers merely reflects its view that members are more qualified than nonmembers to meet their responsibilities as stewards, based on their training and experience. In support of this contention, Respondent argues that its members generally have received formal training through an apprentice program, while a nonmember typically has

not, and that the member is more knowledgeable regarding work rules and jurisdictional disputes due to his exposure to these matters at union meetings. Respondent therefore concludes that its motives were based on objective considerations and not directly on membership in Local 480.

In his Decision, the Administrative Law Judge analyzed the evidence and found that while the five named discriminatees were more frequently passed over by members of Respondent for referrals to special positions, such as steward, they had also been favored over certain members on other occasions. On the basis of such mixed evidence, he concluded that the General Counsel had not met his burden. However, in comparing the overall statistics regarding the incidence of referrals of members and nonmembers as stewards,[4] he concluded that there was a statistically significant difference in these figures. He also found that Respondent's explanation of the disparity was pretextual and that Respondent was motivated by a desire to favor its members on the basis

---

[4] The Administrative Law Judge concluded that the case was tried on a broader basis than with respect to the five named discriminatees, a fact which Respondent disputes. Respondent infers that it was first apprised of this fact at the close of the hearing. However, par. 19 of the complaint includes a broad reference to discrimination against other applicants, and the transcript reveals that, on the first day of the 4-day hearing Administrative Law Judge Blackburn stated:

> It does not seem beyond the realm of possibility, to me, if this case goes in a certain way, a finding of a violation might go beyond the mere names that are listed in the Complaint and be more all-embracing than that.

We therefore find Respondent's argument that it was denied due process in this regard to be without merit.

of membership in Local 480. In discrediting Respondent's explanation, he emphasized the "overwhelming imbalance" in the preference of members of Respondent and concluded that this preference was arbitrary, invidious, and irrelevant to legitimate union interests. In seeking to remedy this violation, the Administrative Law Judge found appropriate a remedy which would grant backpay not only to those discriminatees named in the complaint, but also to "all other nonmember applicants who were similarly situated."

In its brief in support of its exceptions, Respondent argues, in addition to those claims stated above, that even assuming, *arguendo*, that a violation has occurred, at best, it is guilty of entertaining the mistaken notion that it has the right to designate stewards from its own membership. Therefore, it contends, a backpay remedy is not warranted and a simple cease-and-desist order is appropriate.

The legal standard to be applied in determining whether Respondent has violated the Act, as alleged, was properly formulated by the Administrative Law Judge. As stated in *Ashley, Hickman-Uhr Co.*, 210 NLRB 32, 33 (1974):

> The key issue is whether Respondent Union's action herein was arbitrary, invidious, irrelevant, and thus a mask for discriminatory motivation.

The Administrative Law Judge found and we agree that, in the circumstances herein, picking men because they are members of Respondent is an arbitrary and invidious reason unrelated to any legitimate business reason of Respondent.[5]

---

[5] Chairman Fanning finds it unnecessary to rely on these descriptive terms. See fn. 3 of *Ashley, Hickham-Uhr Co., supra.*

Although it is a well-established tradition that a union is entitled to have its own members as stewards in order to promote "the effective functioning of collective bargaining," [6] the record herein clearly shows that Respondent's true purpose in providing its own members with a disparate share of the steward appointments was to secure a disproportionate number of jobs for them. Thus, by improperly resorting to that device, Respondent followed the same basic pattern of discrimination against nonmembers which was found unlawful in recent cases wherein Local 373 [7] and Local 45 [8] of the Ironworkers were instrumental in securing jobs for a disproportionate number of their members and thereby violated Section 8(b)(1)(A) and 8(b)(2).

However, we do not agree with the Administrative Law Judge's conclusion that the evidence presented by the General Counsel with respect to the five named discriminatees alone is insufficient to prove discriminatory motivation by Respondent in the referral of stewards. The evidence presented clearly indicates that the position of steward was freely utilized at various times within the 10(b) period to give preference to approximately two-thirds of Respondent's members who applied for referrals. This fact, there-

---

[6] *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521 (1949).

[7] *International Association of Bridge, Structural & Ornamental Ironworkers, Local 373 (Building Contractors Association of New Jersey)*, 232 NLRB 504 (1977), and 235 NLRB 232 (1978).

[8] *International Association of Bridge, Structural & Ornamental Ironworkers, Local 45 (Building Contractors Association of New Jersey)*, 232 NLRB 520 (1977), and 235 NLRB 211 (1978).

fore, casts into extreme doubt the statement made by Respondent's business manager, Francis Arny, that "Ninety percent of the stewards are in the business over twenty-five years."

Moreover, close observation of the referral registers reveals that Gary Christensen, a member of Respondent who had only recently advanced from the status of apprentice, had been favored for position as steward over three of the named discriminatees; Serafin, Dailey, and Cron. Specifically, the register shows that Christensen last classified himself as an apprentice on July 27. Starting with his registration on August 16 he classified himself as a journeyman.[9] Yet, irrespective of this recent change in status, Christensen was given preference over Dailey on October 13 for a referral as steward although Dailey's entry had predated Christensen's and Dailey had over 4 years' experience as an ironworker. In addition, on April 28, 1977, Christensen was again referred as a steward despite the prior registrations of Serafin, Dailey, and Cron, all of whom at that time had previously been referred as stewards. That Christensen could have been considered to have been objectively more qualified for the position of steward, despite Cron's 15 years' experience at the trade, Serafin's experience of 8 years, and Dailey's experience as noted above, is incredible. While Christensen apparently had completed his apprenticeship training at the time of these referrals, this fact alone is insufficient to show that he was objectively the "senior, experienced applicant" who could be preferred as a steward under the terms of the consent decree.

---

[9] This latter entry also indicates that he was referred as a steward on August 18.

Furthermore, a careful study of the referral register reveals that repeatedly, after each of the five named discriminatees had signed the referral register, other members of Respondent were referred ahead of them as stewards. Preference for members of Respondent as stewards occurred after Serafin had signed the register on at least 11 occasions, after Dailey had signed on 12 occasions, after Cron had signed on 11 occasions, after Dietz had signed on 9 occasions, and after Korab had signed on 2 occasions. With respect to Serafin, Cron, and Dailey, the register shows that these individuals were passed over approximately 50 times each by the preferred members. However, Respondent has failed to come forward with specific evidence to indicate that any of these preferred members were more qualified than the named discriminatees. We therefore find that Respondent clearly violated the Act by discriminatorily preferring its members as stewards over these named individuals.

In addition, we agree with the Administrative Law Judge's broader finding that the overall statistics reveal a generalized preference for member stewards over nonmember stewards which cannot be justified by nondiscriminatory considerations. As noted above, this preference operated at over a 5-to-1 ratio and is inadequately justified by Respondent's explanations. In admitting its preference for members over nonmembers, Respondent emphasized that members had the benefit of training programs and information received at union meetings. However, there is no evidence to show how many of its members either completed training programs or regularly attended

union meetings.[10] While the evidence does not show that the referrals as stewards accorded to members were deceitful,[11] the alleged objective criteria used in the selection of stewards were clearly a mask to cover a discriminatory preference for its members in assigning the available work. No legitimate justification has been adduced for Respondent's otherwise unlawful conduct in giving preference to its own members by referring them in disproportionate numbers to positions as stewards. We therefore find that Respondent has, in violation of Section 8(b)(1)(A) and 8(b)(2), engaged in a consistent pattern of unlawful discrimination under the pretext of the consent decree classification system by referring its members to work in preference to the nonmember named discriminatees and all similarly situated nonmember applicants.[12]

THE REMEDY

In his Decision, the Administrative Law Judge provided that the remedy in this proceeding should be

---

[10] In his Decision, the Administrative Law Judge referred to the fact that the record did not indicate whether any nonmembers had received prior training. In the absence of evidence to indicate whether any significant portion of member or nonmember applicants had received prior training, we find that Respondent has failed to prove that such training had any real bearing on the referral of stewards.

[11] Cf. *International Association of Bridge, Structural & Ornamental Ironworkers, Local 373 (Building Contractors Association of New Jersey), supra.*

[12] In limiting the violations found herein to those instances when members of Respondent were discriminatorily referred as stewards, we adopt the Administrative Law Judge's finding that the General Counsel has failed to show that nonmembers have been discriminated against with respect to referrals under the "special skills" classification.

identical to that provided by the Board in *Building Contractors Association of New Jersey*, 232 NLRB 504. As in that case, the complaint herein not only alleges that Respondent has violated the Act as to certain identified nonmember applicants, but also alleges more broadly that Respondent has discriminated against "other of its applicants for its employment." In view of our finding that Respondent Local 480 has committed widespread unfair labor practices against nonmember applicants seeking employment through its hiring hall, we agree with the recommendation of the Administrative Law Judge that Respondent must be required to cease and desist from discriminating against the five identified discriminatees, as well as all nonmember applicants similarly situated. We also shall provide that Respondent make whole the identified discriminatees and all nonmember applicants similarly situated who sought employment opportunities during the relevant period for any loss of earnings they may have suffered by reason of Respondent's discrimination against them.[13] Such backpay will be applied under a formula whereby the overall earnings of all applicants, members and nonmembers, seeking employment through its referral system would be

[13] In view of our finding herein that Respondent has engaged in a pattern of widespread discrimination against nonmember applicants seeking employment through its hiring hall, and the reference in the complaint to unnamed applicants, we find it appropriate that the above-described remedy should be granted both the named and the unnamed discriminatees for any loss of earnings they may have suffered by reason of Respondent's discrimination against them. See *Painters, Decorators, and Paperhangers of America, Local No. 985 (W. F. Sahualia & Co., Inc.)*, 194 NLRB 323 (1971); *Harold Goldsmith and Ada J. Goldsmith, d/b/a Superior Maintenance Company*, 133 NLRB 746 (1961).

divided by the total number of ironworkers who worked out of the hiring hall, taking into account the net earnings of the individual discriminatees during the relevant period and providing for the inclusion of interest as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).[14]

We shall additionally require that Respondent keep and retain for a period of 2 years permanent written records of its hiring hall operations and make those available to the Regional Director upon request. We shall further order Respondent to submit to the Regional Director four quarterly reports concerning the employment of the five named discriminatees and other nonmember applicants subsequently found to have been similarly situated. Furthermore, we shall order Respondent to place the referral registers, for a period of 2 years, on a table or ledge in its hiring hall for easy access and inspection by all applicants upon completion of each day's entries in such registers. Finally, in addition to a requirement that Respondent post an appropriate notice, we shall direct that Respondent cause such notice to be printed in a newspaper of general circulation within its jurisdictional area.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Association of Bridge, Structural & Ornamental Ironworkers, Local 480, AFL-CIO, Elizabeth, New Jersey, its officers, agents, and representatives, shall:

---

[14] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

1. Cease and desist from:

(a) Causing or attempting to cause the separate employer-members of the Building Contractors Association of New Jersey, or any other employer, to discriminate against any of the following employees: Walter Serafin, Edward Korab, Ronald Cron, Robert Dailey, and Daniel Dietz, or any other employees, in violation of Section 8(a)(3) of the National Labor Relations Act because of their lack of membership in Local 480, or for other arbitrary or invidious reasons.

(b) In any other manner restraining or coercing employees or applicants for employment in the exercise of their rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Keep and retain for a period of 2 years from the date of this Decision and Order permanent written records of its hiring and referral operations which will be adequate to disclose fully the basis on which each referral is made, and, upon the request of the Regional Director for Region 22, or his agents, make available for inspection, at all reasonable times, any records relating in any way to the hiring and referral system.

(b) Submit four quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter, subsequent to the issuance of this Decision and Order, concerning the employment of the above-named employees and other nonmember applicants subsequently found to have been similarly situated. Such reports shall include the date and number of job applications made to Respondent, the date and

number of actual job referrals by Respondent, and the length of such employment during such quarter period.

(c) Place the referral registers, for a period of 2 years, on a table or ledge in the hiring hall for easy access and inspection by the applicants as a matter of right, upon the completion of each days entries in such registers.

(d) Make whole each of the above-named employees, and all other nonmember applicants who were similarly situated, for any loss of earnings they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records, reports, work lists, and other documents necessary to analyze the amount of backpay due under the terms of this Decision and Order.

(f) Post at all places where notices to employees, applicants for referral, and members are posted copies of the attached notice marked "Appendix." [15] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter,

---

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Cause, at its expense, the attached notice marked "Appendix" to be printed in a newspaper of general circulation in Elizabeth, New Jersey.

(h) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

# APPENDIX

## NOTICE TO MEMBERS
## POSTED BY ORDER OF THE
## NATIONAL LABOR RELATIONS BOARD
## An Agency of the United States Government

WE WILL NOT cause or attempt to cause any of the employer-members of the Building Contractors Association of New Jersey, or any other employer, to discriminate against any of the following employees:

| | |
|---|---|
| Walter Serafin | Robert Dailey |
| Edward Korab | Daniel Dietz |
| Ronald Cron | |

or any other employees, in violation of Section 8 (a) (3) of the National Labor Relations Act, because of their lack of membership in Local 480, or for other arbitrary or invidious reasons.

WE WILL NOT in any other manner restrain or coerce employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL keep and retain for a period of 2 years permanent written records of our hiring and referral operations which will be adequate to disclose fully the basis on which each referral is made and, upon the request of the Regional Director for Region 22, or his agents, make available for inspection, at all reasonable times, any records relating in any way to the hiring and referral system.

WE WILL submit four quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter subsequent to the issuance of the Board's Decision and Order, concerning the employment of the above-named employees and those non-

member applicants subsequently found to have been similarly situated. Such reports shall indicate the date and number of job applications made to us, the date and number of our actual job referrals, and length of such employment during such quarter.

WE WILL place the referral registers, for a period of 2 years, on a table or ledge in our hiring hall for easy access and inspection by the applicants as a matter of right, upon the completion of each day's entries in such registers.

WE WILL make whole each of the above-named employees, and all other nonmember applicants who were similarly situated, for any loss of earnings they may have suffered by reason of our discrimination against them.

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL &
ORNAMENTAL IRONWORKERS,
LOCAL 480

# DECISION

## STATEMENT OF THE CASE

BENJAMIN K. BLACKBURN, Administrative Law Judge: The charge was filed on January 12, 1977. The complaint was issued on February 28. The hearing was held on May 11 and June 7, 8, and 9 in Newark, New Jersey. The issue litigated was whether Respondent operates its hiring hall in a manner which discriminates against nonmembers, thereby violating Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended. For the reasons set forth below, I find that it does.

Upon the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after due consideration of briefs, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Building Contractors Association of New Jersey (BCA), a New Jersey corporation, is an association of employers engaged in the building and construction industry whose principal offices are located in the State of New Jersey. During the 12 months just prior to issuance of the complaint, members of BCA received at various jobsites in the State of New Jersey goods and materials valued in excess of $50,000 which were shipped directly to those jobsites by suppliers located outside the State of New Jersey.

### II. THE UNFAIR LABOR PRACTICES

#### A. *Background*

BCA negotiates and enters into collective-bargaining agreements with various labor organizations on behalf of its members. In the case of the Ironwork-

ers, it deals with the District Council of Northern New Jersey, of which Respondent is a member. The contract between BCA and the District Council provides, in pertinent part:

> Article XV
>
> HIRING HALL
>
> 15.1 Every Employer bound hereby agrees that he will recruit all employees covered hereby exclusively through the several hiring halls operated by the Union and/or its Locals. The said hiring halls shall be operated by the Union and its Locals in a non-discriminatory manner and on a non-discriminatory basis in accordance with the said Decree in U.S. v. Plumbers Local 24 et al Civil Action No. 444-71 etc. . . .
>
> 15.2 The said Hiring Halls shall be operated in accordance with the provisions of said Decree mentioned in the preceding Article.

"[S]aid Decree in . . . Civil Action No. 444-71" is a reference to a consent decree entered into by the District Council and its locals, Respondent included, in 1972 which provides that their hiring halls shall be operated "in accordance with" various collective-bargaining agreements, including the one with BCA, "and referral practices currently in force between the contracting parties, except as modified by the ensuing provisions." Civil Action No. 444-71 was a Title VII suit brought by the United States of America against various labor organizations. Consequently, the thrust of the decree which Respondent consented to was to forbid Respondent to discriminate against applicants for referral to jobs as ironworkers on the ground of

race, creed, color, or national origin. Those parts of the decree which are pertinent to this case are:

6. The classifications or phases of the ironworker's craft, for which an applicant can qualify for referral, either severally or jointly, are:

(a) Rodwork (including the several subdivisions thereof)

(b) Structural work (including the several subdivisions thereof)

(c) Finishing work (including the several subdivisions thereof)

(d) Sheeting work (including the several subdivisions thereof)

(e) Welding work (including the several subdivisions thereof)

(f) Rigging work (including the several subdivisions thereof)

(g) Fencing work (including the several subdivisions thereof)

(h) Ornamental and Miscellaneous Ironwork (including the several subdivisions thereof)

Note that a worker may be qualified for referral or desire referral in some but not all of the subdivisions of a given phase of the ironworkers craft.

* * * * *

10. The Defendants, Local Unions Nos. 11, 45, 373, 480 and 483, shall require each person who enters their respective hiring halls seeking employment in said craft within their respective geographical jurisdictions, to complete, on the occasion of his first such visit, a serially numbered Application for Referral whereon he shall state his name, address, telephone number, age, race, social security number, un-

ion affiliation, if any, his ironworker classification or classifications, or the phase or phases of the ironworkers craft he is qualified to perform and such summary of his previous experience in the stated phase or phases as to enable convenient verification, if necessary.

11. Each applicant may state more than one classification, or phase of the craft, or subdivision thereof, for which he is qualified and desires referral.

* * * * *

20. (a) An applicant's name shall remain on the Referral Register until he has been offered a referral, or offered referrals in that or those phases of the craft or subdivisions thereof for which he has indicated qualifications and desire for referral.

(b) In the event a referral is offered to an applicant in one phase of the craft or subdivision thereof for which he has indicated qualification and desire for referral, and he refuses to accept, such refusal shall be noted in the Register opposite his signature, whereupon he shall be required to reregister and his name shall be placed at the bottom of the list for that phase.

(c) In the event a referral is offered to an applicant in several phases of the craft in the order of his stated qualification and preferences, his refusal of one offer shall disqualify him from receiving further offers in that phase or subdivision thereof until he registers. He shall not forfeit his right to referral to the other stated preferences until he has refused all offers therefor.

* * * * *

27. Referral of applicants will be made by the defendant locals listed in this Consent Decree by their

respective classifications and in chronological order of registration, except that:

(a) no applicant shall be referred to any job for which he has not indicated qualification and desire for referral pursuant to paragraphs 10 and 11 hereof or in which he has performed in an unsatisfactory manner as covered in paragraph 9 hereof;

(b) an applicant may be referred out of chronological order if he possesses special skills and abilities required by a bona fide request by a contractor, which special skills and abilities are not possessed by any other applicant preceding him on the referral list;

(c) an applicant may be referred out of chronological order if a contractor requests the applicant by name. The union shall record such request together with the name of the contractor's representative making the request. The union shall not make available to calling contractors the list of names of persons then currently registered for referral. The union shall request written confirmation from the contractors of each request or referral of applicants by name;

(d) an applicant may be referred out of chronological order if he is a trainee or advanced trainee of the Iron Worker Training Program within the geographical jurisdiction of the local unions referred to in this Consent Decree. The referral of such trainees shall be as directed by the Local Project Director of the Training Program in order to permit fulfillment of job experience on the various phases of the craft. However, such referrals shall not in any way diminish the number of journeymen necessary to perform the work on the project or job;

(e) an applicant may be referred out of chronological order if he is an apprentice registered in the Iron Workers of America Program where such out of

order referral is necessary in order to fulfill the course requirements of on-the-site training for such apprentice;

(f) In any instance where a contractor requests a specific person to serve as a foreman on a job, he may be referred to the contractor if his name appears on the Register for referral;

(g) Senior, experienced applicants may be referred out of chronological sequence to act as stewards for the work crew at a particuar job site as may be deemed necessary or proper by the union official in charge of referrals thereto. This shall be limited to one steward for each contractor.

(h) Contractors who are obligated to meet specific affirmative action general conditions and specifications or other affirmative action requirements as imposed by any governmental agncy (Federal, State or Local) may request qualified ironworkers, specifying the race of the workers needed; in such instances the union shall refer the requested number of individuals by race, whether white or minorities, if available;

(i) in order to distribute scheduled overtime work fairly and equitably among many applicants, each local union may, without regard to the chronological order of registration, refer later registered applicants in their chronological order to succeeding scheduled overtime jobs. A notation shall be made in the daily Referral Register of the names of those so bypassed and the reasons therefor;

(j) if a job site is distant more than 25 miles from the referring union hall, the local union may, without regard to the chronological order of registration or other provisions hereof, either refer the nearest resident applicants thereto if there be no objections from the preceding applicants, or transfer such residents from other jobs thereto on a voluntary basis

and fill the vacancies created by the latter option from the referral list in the required chronological order;

(k) Emergency employer requisitions communicated during other than normal referral hours on Saturdays, Sundays or Holidays may be filled in an expeditious manner without regard to the chronological order of registration for referral.

28. Whenever any preceding registered applicant is bypassed for any of the reasons stated in the foregoing section or referred out of the required chronological order of registration, the local unions shall, in an appropriate column, state such fact and the reasons therefor. Additionally, said local unions shall notify each inquiring applicant as to the reason for such out of sequence referral.

29. Employers may continue to exercise their right to retain ironworkers in their employ on a permanent basis in the same manner and to the same extent as heretofore and pursuant to applicable collective bargaining agreements and practices and precedents thereunder.

Respondent has approximately 185 members, approximately 155 of whom are working at their trade and seek work through its hiring hall. They are referred to in the record as local men. In addition, approximately 50 ironworkers who are members of the international union but belong to locals other than Respondent also regularly shape its hiring hall. They are referred to in the record as out-of-town or non-local men. They are, by and large, natives of the area who have obtained their union books in other parts of the country and have since sought work on a regular basis in northern New Jersey. Four of the five discriminatees named in the complaint apparently fall into this category. Walter Serafin and Edward Korab

are members of Local 28 in Richmond, Virginia; Ronald Cron, Local 489, Scranton, Pennsylvania; and Robert Dailey, Local 697, Roanoke, Virginia. Daniel Dietz is a member of Local 361 in New York City.

An ongoing dispute between Respondent and some of the nonlocal men over the latter's desire to transfer their memberships to Respondent and thus become local men underlies this case. Building and construction have been depressed in northern New Jersey for several years to the extent that there has been insufficient work to keep all ironworkers regularly employed. Nonlocal men have sought to become local men because they believe, rightly or wrongly, that local men get more work than they. A group of them, including the five specifically named as discriminatees in the complaint, retained the Charging Party, who filed suit on their behalf in the Superior Court of New Jersey in late 1975 in an effort to force Respondent to accept their transfers. A trial was held before Judge Ackerman in the spring of 1977. No decision had been rendered at the time of the hearing in this case.

Respondent has consistently maintained the position, both in and out of court, that it is precluded from accepting transfers because of a commitment under the consent decree to bring its membership into racial balance. Francis (Gene) Arny, Respondent's business manager, and Frank Wade, its secretary-treasurer, have, at various times in various conversations with various nonlocal men who are parties to the state court suit, expressed their animosity toward nonlocal men who are trying to force their way into Respondent by bringing suit. Arny and Wade run its hiring hall.

B. *Facts*

Respondent has a right to refer ironworkers out of chronological order where special skill and steward situations as contemplated in the consent decree arise.[1] In applying subparagraph (b) of paragraph 27, Arny and Wade consider certified welder (i.e., a welder who has demonstrated his proficiency by passing a test and being awarded a certificate either by a state agency or by an employer) and connector (i.e., a man who performs that subdivision of structural work which involves the fastening of one iron beam to another) as jobs which call for special skill. When they receive calls for men possessing either of these two skills, they call for volunteers from among those in the hall, and give the job to the volunteer with the highest position on the referral list. Failure to volunteer does not cost a man who happens to possess the skill being sought his place on the list. Similarly, a specially skilled man higher than the man referred who happens to be absent from the hall when the call comes in does not lose his place by being marked absent. (Normally, a man who rises to the top of the list and then is not present when his name is called is marked absent. He must then register at the bottom of the list.)

In applying subparagraph (g) of paragraph 27, Arny and Wade use their own judgment to pick a senior, experienced man when a steward is needed. In their view, men become "senior, experienced applicants" either through membership in the interna-

[1] The General Counsel does not contend Respondent is acting illegally in applying any of the other subparagraphs in par. 27 of the decree. He specifically disavowed any contention Respondent is discriminating against nonlocal men on the basis of their minority or apprentice status.

tional union or by completing an apprenticeship program. All men who have been referred by them to jobs as stewards under the latter criterion are members of Resondent.

In the 10(b) period, i.e., the period beginning on July 12, 1976, and ending at the close of the hearing, Walter Serafin was not referred in chronological order on 12 of the occasions on which he signed the referral register. Men who signed after him and were sent out ahead of him were members of Respondent. The remark entered into referral register by Arny or Wade to justify a few of these referrals is "special skill." The overwhelming majority, however, are marked "steward." The same thing is true of each of the other four discriminatees named in the complaint. During the 10(b) period, Edward Korab was bypassed on two efforts to find work; Ronald Cron, 13; and Robert Dailey and Daniel Diez, 11 each. On each occasion, at least one and, more often than not, several local men got jobs more quickly with the explanation that the local man's special skill or Respondent's need for a steward on the job justified the deviation. Usually, the failure to follow strict chronological order meant that the discriminatee was sent out several days later than he would have been if an exception had not been invoked by Arny or Wade.

Perusal of the register reveals other occasions where nonlocal men were referred to jobs after local men who followed them on the list with either "special skill" or "steward" as the justification. For example, in the former category, R. Cabarle, a nonlocal man, listed his skills as journeyman ironworker and welder when he signed the register on July 19, 1976. (Most entries in the register bear the notation "JIW," indicating that the man considers himself a journey-

man capable of performing any of the tasks that make up the trade.) When James Murphy, a local man, signed in on July 21, he indicated he was a journeyman. Murphy was referred to a job as a welder on July 26 and "special skill" was entered in the register. Cabarle waited until August 3 before he was referred to a rod job.

An example in the second category around the same time involves R. Gougeon, a nonlocal man, and A. Edel, a local man. Both signed in on July 21, Edel three lines below Gougeon. Edel was referred out as a steward the same day. Gougeon waited for a job until August 5. He, too, was sent out as a steward.

Finally, a detailed study of the register during the 10(b) period reveals the following pattern. "Referrals" is the total number of men who registered and eventually got jobs. "Days" is the time they waited as a group. "Special skill" and "steward" are the number of each notation justifying referrals. The ratios are self-explanatory:

| | Local | Nonlocal |
|---|---|---|
| Referrals | 1,036 | 876 |
| Days | 7,612 | 9,808 |
| Days/referrals | 7.35 | 11.20 |
| Special skill | 80 | 109 |
| Referrals/special skill | 12.95 | 8.04 |
| Steward | 341 | 3 |
| Referrals/steward | 3.04 | .53 |

### C. *Analysis and Conclusions*

The issue posed by the complaint and developed by the record is twofold. Does Respondent favor local men over nonlocal in the operation of its hiring hall? If so, why? Respondent, understandably, elected to fight the battle on the first line. Consequently, while it has not conceded defeat if its first line is breached,

it is, for all practical purposes, in that position. Its ongoing resistance to transfers by men from other locals is not denied. While it does not concede that it is resisting transfers by white men for any reason other than a desire to bring the racial makeup of its membership into an 80-percent white—20-percent minorities balance, the words attributed to Gene Arny and Frank Wade by the General Counsel's witnesses which show Respondent's resentment at nonlocal men's bringing suit to force Respondent to admit them are uncontroverted. More importantly, the following analysis of the first question can only lead to the conclusion that lack of membership is the standard which Respondent, in the person of Arny and Wade, is using frequently, if not always, when it departs from a strict chronological basis in referring men to jobs. Whether in the case of any individual discriminatee, named or unnamed, the reason is exacerbated by his participation in the suit in the Superior Court of New Jersey is unimportant. In the final analysis, the record establishes that what, if anything, Respondent is doing illegally to favor local men over nonlocal it is doing because the disfavored are not members.

This case, then, turns on whether the General Counsel has proved by a preponderance of the evidence that the answer to the first question is yes. Both the General Counsel and Respondent have approached that question by analyzing the referral register in terms of the five named discriminatees. (The Charging Party adopted the General Counsel's brief in this respect.) A portion of each of their briefs illustrates this approach and demonstrates its inadequacy in resolving the issue. With respect to Walter Serafin, for example, the General Counsel makes these points:

Serafin signed the register (GCX-2 P. 5245 (16)) on August 13, 1976 and was referred on August 18, 1976 to the Lip Steel Company to perform structural work. Appendix "A", P. 1 lists two Local 480 members who signed the referral register subsequent to him, but were referred prior to August 18, 1976 to work that Serafin was qualified to peform. Both of these individuals were listed as stewards.

Serafin also signed the register (GCX-3, P. 7504(15)) on September 1, 1976, and was referred on September 22, 1976 to the Goeller Company to perform structural work. Appendix "A," P. 1, however, lists 12 Local 480 members who signed the registers subsequent to Serafin but were referred prior to September 22, 1976 to work which he was qualified to do. These included ten individuals listed as stewards and two who were referred as connectors and listed as possessing special skills.

He also signed the register (GCX-3 P. 7511 (5)) on September 24, 1976 and was referred on October 7, 1976 to perform miscellaneous ironwork for the Midway Mechanical Company. Appendix "A," P. 1-2, however, lists eight Local 480 members who signed the register subsequent to Serafin and were referred prior to October 7, 1976 to work which he was qualified to perform. These included six individuals who were listed as stewards, and two individuals who were listed as possessing special skills, one being referred as a connector and the other being referred as a welder.

Serafin also signed the register (GCX-3, P. 7518(6)) on October 25, 1976 and was referred

on October 25, 1976 as a connector, to the Buie Steel Company. Appendix "A," P. 2 lists two Local 480 members who signed the register subsequent to Serafin, but were referred prior to October 25, 1976, to work which he was qualified to perform. Both of these individuals were referred as stewards.

He also signed the register (GCX-3 P. 7529 (3)) on November 24, 1976 and was referred on December 7, 1976 to the Schiavonne Company to perform welding work. Appendix "A," P. 2 lists two Local 480 members who signed the register subsequent to Serafin but were referred prior to December 7, 1976 to work which he was qualified to perform. Both of these individuals were listed as stewards.

Serafin also signed the register (GCX-3, P. 7533 (9)) on December 17, 1976 and was referred on January 12, 1977 to the Buie Steel Company, to perform structural work. Appendix "A," P. 2 lists four Local 480 members who signed the ~~register subsequent to~~ Serafin but were referred prior to January 12, 1977, to work which he was qualified to perform. All of these individuals were listed as being stewards.

He also signed the register (GCX-3, P. 7538 (14)) on January 13, 1977 and was referred on February 7, 1977 to the Johansen Company, to perform structural work. Appendix "A," P. 2 lists ten Local 480 members who signed the register subsequent to Serafin but were referred prior to him, to work which he was qualified to perform. All of these individuals were listed as stewards.

Serafin also signed the register (GCX-3, P. 7546(12)) on February 22, 1977, and was referred on March 1, 1977 to the Wilhelms Company. Appendix "A," P. 3 lists one Local 480 member who signed the register subsequent to Serafin but was referred before March 1, 1977, as a steward, to work which Serafin was qualified to perform.

He also signed the register (GCX-3, P. 7549 (7)) on March 3, 1977, and was referred on March 31, 1977 to the Lyons Steel Company to perform structural work. Appendix "A," P. 3 lists 11 Local 480 members who signed the register subsequent to Serafin but were referred prior to March 31, 197[7], to work which he was qualified to perform. These included eight individuals listed as stewards, and three individuals, R. Colaris, R. Slendon and E. Wade, who were not listed as fitting into any of the exceptions to the chronological order of referral upon which Respondent relies.

Serafin also signed the register (GCX-3, P. 7564(14)) on April 21, 1977, and was referred on May 6, 1977 to the Dava Steel Company, to perform structural work. Appendix "A," P. 3 lists six Local 480 members who signed the register subsequent to Serafin but were referred prior to May 6, 1977 to work which he was qualified to perform. All of these individuals were listed as being stewards.

He also signed the register (GCX-4, P. 7570 (5)) on May 9, 1977 and was referred on May 18, 1977 to the E. Rutherford Company to perform structural work. Appendix "A," P. 3 lists two Local 480 members who signed the register

subsequent to Serafin but were referred prior to May 18, 1977 to work which he was qualified to perform. Both of these individuals were referred as stewards.

Serafin also signed the register (GCX-4, P. 7575(2)) on May 23, 1977 and was referred on both June 13 and June 14, 1977 to the Elizabeth Iron Company to perform welding and structural work, respectively. Appendix "A," P. 4 lists 7 Local 480 members who signed the register subsequent to Serafin but were referred prior to June 13, 1977, to work which he was qualified to perform. All of these individuals were referred as stewards.

Respondent's brief takes up the two prongs of the General Counsel's theory separately. On the subject of special skill, it makes these points about Serafin:

> *Special Skills* — The registers do not in any way or fashion contradict the testimony of Arny regarding the nondiscriminatory utilization of this exception. All of named parties were on occassion [sic] either jumped, or advanced themselves, as a result of this exception. An analysis of the registers reveals the following for each individual:
>
> 1. *Walter Serafin* — According to the registers Serafin signed Respondent's referral books on 16 occassions from August 8, 1976 to April 21, 1977. He was referred out on 13 separate occassions. From the period spanning December 17, 1976 to February 17, 1977, Serafin was marked absent on the three occassions that he signed the book. He was referred out as a steward on one occassion (August 12). On four other

> referrals he was sent out in such a manner that he jumped not only non-local, but local members, in priority of referral. Specifically, on October 25, Serafin was sent out as a connector thusly jumping 3 local 480 members. On March 1, he was returned to a previous contractor thereby jumping 7 local members. On April 6, he was "requested" by a contractor thereby jumping two local members. Lastly, on April 20, he was referred out to do connecting thereby jumping seven members of Respondent's Local. On three other referrals, i.e., October 28, December 7 and April 11, no one was referred to work ahead of Serafin out of chronological order. The referral register reflects, therefore, a total lack of animus on the part of Respondent against Serafin. He was treated just the same as every other job applicant at the Respondent's hiring hall—no better or no worse. If he volunteered for a special skill he was given the assignment; if he was absent or didn't volunteer he was passed over. As stated above, this procedure is in full conformity with the dictates of the Consent Decree.

Both presentations are factually accurate. Each supports the position of the party advancing it. Serafin was, in fact, discriminated against in the sense that local men were sometimes, although not always, jumped over him. By the same token, the system less frequently worked in his favor in the sense that he jumped over others. On occasion, he was sent out as a steward (a point which anticipates the second half of Respondent's argument). The same is true of Edward Korab, Ronald Cron, Robert Dailey, and Daniel Dietz. Such findings do not, however, support a conclusion that Respondent violated the Act, for they

lack the requisite proof that Respondent favors local men over the five men named in the complaint for a reason proscribed by the Act. Rather, the evidence when limited to the five is equally susceptible to an interpretation that Arny and Wade were motivated, as Arny claimed, by considerations having nothing to do with whether applicants were local or nonlocal men. (Wade did not testify.) If the analysis stops there, the General Counsel loses.

Despite the fact that paragraphs 15, 16, and 17 of the complaint, the paragraphs in which the General Counsel has alleged the facts on which he relies, name only Serafin, Korab, Cron, Dailey, and Dietz,[2] the case was tried on a broader basis. The General Counsel zeroed in on the special skill and steward exceptions entered in the register, arguing that Respondent is using them as a pretext to mask its favoring of local men over nonlocal. Respondent defended on the ground the consent decree gave it the right to do what it is doing. The evidence which the General Counsel introduced in support of his theory went beyond the five named discriminatees to encompass all referrals in that part of the register introduced into evidence. Therefore, the analysis cannot stop with the five but must proceed to what the record as a whole reveals with respect to the special skill and steward exceptions.

I have set forth at the end of the section above entitled "Facts" the result of a statistical analysis

---

[2] Conclusionary par. 19 adds the saving words "and other of [Respondent's] applicants for employment" to the five names in alleging that the facts previously stated constitute a violation of Sec. 8(b)(2) of the Act, thereby precluding an argument that the wider analysis to which I am here turning goes beyond the issue pleaded.

of the entries in Respondent's referral register from July 12, 1976, to June 9, 1977, which are relevant to this case. They show that local men, on the average, waited 7.35 days for a referral while nonlocal men waited 11.20. They show that Respondent justified 1 in every 12.95 referrals on the ground that an ironworker with a special skill was requested by the employer when it sent a local man, 1 in 8.04 when it sent a nonlocal. They show that Respondent justified 1 in every 3.04 referrals on the ground that a steward was required to represent it at the jobsite when it sent a local man, 1 in 16.53 when it sent a nonlocal. The differences between the numbers in the first two comparisons are not satistically significant. The difference with respect to the steward exception is.

The waiting time figures are too close to indicate that membership and nothing else caused the difference. They are within limits which might indicate chance and nothing more. The special skill figures show that nonlocal men benefited from this exception more frequently than local. Once again, chance may be the explanation. More importantly, they support rather than belie a conclusion that factors implicit in Arny's explanation (which I therefore credit) of how he and Wade handle such requests could be the cause. In this area, the testimony of the five named discriminatees essentially corroborates Arny both as to what happens when a special skill request is received at the hall and as to the fact that the five have received such referrals when they have volunteered. While the five stoutly maintained that Arny and Wade had selected local men over them and/or other nonlocal men who were higher on the list when persons in each category had volunteered, their testimony as to specific incidents is too vague to cause me to

find that such an event occurred on any particular occasion recorded in the register. Therefore, the General Counsel has not overcome Respondent's explanation that any incidents where the register indicates local men were favored may be due, for instance, to the fact that the nonlocal men were not in the hall at the time or, if present, did not volunteer.

The result is different, however, where the steward exception is concerned. Not only is the difference between 1 to 3.04 and 1 in 16.53 wide enough to be statistically significant, the record as a whole convinces me that Arny's explanation is a pretext masking his true motive, the desire to favor local men. That portion of Respondent's defense is summarized thus in its brief:

> As stated above, Arny testified extensively regarding his criteria in selecting stewards. Two of the chief considerations in the selection process were formal training and a working knowledge of existing work rules acquired by attendance at meetings of the local where such issues were discussed. Arny testified that none of the named parties had ever attended a local meeting even though these meetings were open to nonmembers. Hence, Arny logically concluded that those individuals who attended such meetings were more qualified than those who did not to act as stewards on job sites.
>
> Additionaly, there is nothing in the record regarding any formal ironwork training received by any of the named parties. Rather, an impression is gathered that each of these individuals, with the exception of Dietz, bypassed the training procedures of Respondent, secured their ironworker books from locals located in Virginia,

Pennsylvania, etc., and, thereupon, immediately started shaping Respondent's hiring hall. There is, thusly, lacking any proof that named parties had received any formal training at all—much less comparable training which would equip them for properly handling the duties of a steward.

Also, there is a certain essential continuity of contact with Respondent lacking on the part of named parties. Dietz didn't shape Respondent's hall for over one year—performing no iron work at all from October, 1974 to April, 1976. Cron testified as to working out of Local 373 during 1974 and 1975 (T. 180, 20). Furthermore, he was absent approximately half the times he was called for referral. Dailey was a regular employee of Mohawk Construction Company (T. 327, 3 to 7) and rarely during the past few years shaping Respondent's hiring hall. (T. 327, 22 to 23.)

It is submitted, therefore, that, although the balancing test utilized by Arny does result in the appointment of more Local 480 stewards than non-local stewards, such an approach is a reasonable one consistent with advancing the best business interests of Respondent. It is also an approach permitted under the Consent Decree. No violation of the Act has occurred, therefore, as a result of such referrals.

Once again, Respondent's counsel has accurately set forth the facts with respect to the five discriminatees named in the complaint as they relate to the argument he is advancing. His summary of Arny's criteria is, understandably, condensed, for he is emphasizing that part of Arny's testimony which relates to the facts he is relying on. More fully put, Arny's

testimony about how he exercises his discretion in selecting stewards is that he equates "senior, experienced applicants" as used in subparagraph (g) with either length of time at the trade as measured by membership in the Ironworkers International or formal training during the Ironworkers apprenticeship program in two of three aspects of a steward's role on the job, i.e., work jurisdiction and safety/first aid. (The third thing a steward must concern himself with is collection of moneys due Respondent from employees.) He made the point about how much insight into work jurisdiction local men gain by attending Respondent's meetings when he explained his answer to a hypothetical question. The question was: "You have two men, one local, one non-local and everything else about them is equal. Would you pick the local man or the non-local man in that situation?" Arny answered, "I would pick the local man."

I do not credit Arny's explanation. There is nothing in the record to indicate any nonlocal men got their books after completing apprenticeship training. Therefore, that half of his explanation consciously favors local men. The fact that nonlocal men, including some of the five discriminatees named in the complaint,[3] do get such assignments demonstrates that time at the trade is alone sufficient to qualify a man to perform a steward's duties. The overwhelming imbalance between 1 in roughly 3 for local men and 1 in roughly 16½ for nonlocal, without a showing that, in the entire group of men who shape Respond-

[3] Serafin, Cron, and Dietz testified that steward referrals stopped for them when they got involved in the lawsuit filed in the Superior Court of New Jersey. Serafin was not completely accurate since the register shows one such assignment for him in the 10(b) period.

ent's hiring hall, that portion which is made up of local men contains members of long standing in the Ironworkers union at a level which is more than five times as large as the portion which is made up of nonlocal men, leads me to the inescapable conclusion that Arny and Wade are consciously using the steward exception to favor local men over nonlocal.

This finding leaves at naught Respondent's legal argument. It cites *Ashley, Hickham—Uhr Co.*, 210 NLRB 32 (1974), and *International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO (Alaskan Chapter of the Associated General Contractors of America)*, 146 NLRB 1358 (1964), cases in which unions were held not to have acted illegally in selecting stewards. These cases stand for the proposition that no violation occurs when a union has a legitimate interest in referring one man other another. The union's action impinges upon the employment relationship only when its reasons are arbitrary, invidious, or irrelevant to legitimate union interests. Here, picking men because they are members of Respondent is an arbitrary and invidious reason unrelated to any legitimate business reason of Respondent.

This case comes down in the end to whether Respondent has a right to interpret the language of subparagraph (g)—"[s]enior, experienced applicants . . . as may be deemed proper by the union official in charge of referrals"—the way it is. Its interpretation favors local men over nonlocal at a rate of more than five to one. Such an interpretation of a document designed in its totality to prevent Respondent from discriminating against anyone for any reason would be a perversion. I find, therefore, Respondent has violated Section 8(b)(1)(A) and (2) of the Act by using membership as the criterion for referring ap-

plicants to jobs as stewards, thereby causing members of the Building Contractors Association of New Jersey and other employers to discriminate against employees in violation of Section 8(a)(3) of the Act.

Upon the foregoing findings of fact, and upon the entire record in this case, I mak the following:

## Conclusions of Law

1. Members of the Building Contractors Association of New Jersey are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Bridge, Structural & Ornamental Ironworkers, Local 480, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By using membership as the criterion for referring applicants to jobs as stewards, thereby causing members of the Building Contractors Association of New Jersey and other employers to discriminate against employees in violation of Section 8(a)(3) of the Act because of their nonmembership, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## The Remedy

In order to effectuate the policies of the Act, it is necessary that Respondent be ordered to cease and desist from the unfair labor practices found, remedy them, and post the usual notice. It is the General Counsel's position that to be adequate the order must direct "that Respondent's hiring hall operations . . . be subjected to scrutiny by a neutral moderator [sic]

to be appointed by the Regional Director, after consultation with all parties concerned, in order to oversee the daily operations of the hiring hall, with full costs to be borne by Respondent." This is, essentially, the remedy recommended by Administrative Law Judge Thomas A. Ricci in *International Association of Bridge, Structural & Ornamental Ironworkers, Local 373 (Building Contractors Association of New Jersey)*, 232 NLRB 504 (1977). Since the General Counsel submitted his brief in this case, the Board has issued its Decision in Judge Ricci's case. It declined to order the appointment of a neutral monitor. Rather, it devised other measures designed to achieve the same purpose. Since the violation found here is the same as that found in Judge Ricci's case, I shall recommend an order identical to the one issued by the Board there. Backpay shall be computed on a quarterly basis, plus interest, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977), using the formula specified by the Board in Judge Ricci's case.

[Recommended Order omitted from publication.]

**APPENDIX G**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 78-2014

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO, RESPONDENT

---

## MOTION FOR PARTIAL RELIEF FROM JUDGMENT

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Respondent, International Association of Bridge, Structural & Ornamental Ironworkers, Local 480, AFL-CIO, by its attorneys, Nolan, O'Neill & Moore, Esqs., moves this Court pursuant to the provisions of Federal Rule 60(b)(6) for partial relief from the terms of the final Judgment and Order entered against it by this Court dated May 11, 1979, as amended by Order dated December 1, 1982. This Judgment Order granted enforcement of its entirety to an order of the National Labor Relations Board dated May 9, 1978, which included the following backpay provision:

> 2(d) Make whole each of the above-named employees, and all other non-member applicants who

were similarly situated, for any loss of earnings they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of this Decision and Order entitled, "The Remedy".

This Judgment was modified by Order dated December 1, 1982, which established a termination date of December 31, 1982, for the issuance of a formal back pay specification. Subsequently, the Board issued a Backpay Specification and Notice of Hearing dated December 21, 1982, which Respondent contends fails to comply with either the formula to establish back pay which is set forth in the Board's Decision and Order or with the Board's own rules and regulations regarding the issuance of backpay specifications.

Respondent, therefore, requests the following relief:

(a) An Order declaring backpay proceedings to be terminated for failure of the Board to issue a valid Backpay Specification by December 31, 1982, pursuant to this Court's Order dated December 1, 1982; or, alternatively;

(b) An Order modifying the Judgment-Order dated May 11, 1979, to remove from the backpay requirement "all other non-member applicants who were simularly situated" on the grounds that the Board's backpay specification is unenforceable because punitive in nature and no longer in furtherance of the principles underlying the passage of the National Labor Relations Act.

In support of its motion, Respondent shall rely upon the Affidavit of John J. Mulvihill, Esq., attached

hereto, as well as the Memorandum of Law submitted herewith.

NOLAN, O'NEILL & MOORE
Attorneys for the Respondent,
Local #480

By: /s/ John J. Mulvihill
JOHN J. MULVIHILL

Dated: February 25, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 78-2014

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

---

## AFFIDAVIT IN SUPPORT OF MOTION FOR MODIFICATION

STATE OF NEW JERSEY )
) ss:
COUNTY OF OCEAN )

JOHN J. MULVIHILL, of full age, being duly sworn upon his oath deposes and says:

1. I am a partner with the firm of Nolan, O'Neill and Moore, Esqs., attorneys for Respondent Ironworker Local 480 in the within matter. I have personal knowledge of all the allegations set forth in this affidavit. This affidavit is made in support of Local 480's motion for partial relief from the terms of the Judgment-Order entered against it on May 11, 1979, as modified by Order dated December 1, 1982.

2. The December 1, 1982, modification order was issued by this Court in response to Respondent's previously filed motions for modification. The basis for

these motions was that the prolonged delay in implementing the backpay provisions of the Order had proven the remedy to be unworkable and, thus, unenforceable.

3. In opposing Respondent's motions, the Board submitted affidavits from Edward J. Peterson, compliance officer and Gregory M. Burke, field examiner, which set forth explanations as to the reasons for the prolonged delay. In his affidavit dated May 5, 1982, Mr. Burke represented that among the necessary steps that need be taken was the following:

> (17) For each year, the total earnings of all who signed the register will be divided by the total number of individuals involved. The resulting average will be the gross backpay. Then, for each identified discriminatee, actual earnings will be deducted from gross backpay, by calendar quarter. The result will be net backpay, which may be further reduced by other interim earnings or increased by offset of additional expenses against interim earnings. This process is estimated to take approximately two to three months, as all calculations will be documented separately for purposes of the backpay specification. When net backpay has been calculated, the backpay specification will be prepared and issued. This final process is estimated to take approximately one week.

4. This requirement was reiterated in the Board's legal memorandum wherein it was stated:

> According to the Board's order as enforced by the Court, upon determination of the identity of the similarly situated employees, the amount owing to each discriminatee is to be measured

> by the average earnings of all of the employees, members and non-members together, *from job referrals from Local 480's hiring hall during the backpay period*, taking into account the actual net earnings of the individual discriminatees during the same period.
>
> (emphasis added; p. 3-FN2)

5. These representations were premised upon the "Remedy" as set forth by the Board in its Decision and Order dated May 9, 1978. (235 NLRB No. 212). This decision established a formula to calculate backpay in the following language:

> Such backpay will be applied under a formula whereby the overall earnings of all applicants, members and nonmembers, seeking employment through its referral system would be divided by the total number of ironworkers who worked out of the hiring hall, taking into account the net earnings of the individual discriminatees during the relevant period and providing for the inclusion of interest as provided in *Florida Steel Corporation*, 321 NLRB No. 117 (1977).

6. The Board issued its Backpay Specification and Notice of Hearing in this matter on December 21, 1982. (A copy of this pleading is annexed hereto as Exhibit "A"). Among its other deficiencies, this specification fails to contain the following basic information:

(a) the total actual earnings amount of all local members who were referred out of the Local 480 hiring hall;

(b) the total actual earnings amount of all non-local members who were referred out of the Local 480 hiring hall;

(c) the average earnings of all ironworkers who were referred out of the Local 480 hiring hall;

(d) the amount of interim earnings of the alleged discriminatees during the backpay period.

7. On February 18, 1983, I met with Mr. Burke in the Board's offices in Newark in order to review the Board materials utilized in preparing the backpay specification. On that occasion I was informed of the following:

(a) the board did not have in its possession any records dealing with the actual earnings of Local 480 members. Instead, the average earnings figure contained in the specification was arrived at by picking at random the names of six Local 480 members. As to these individuals the Board reviewed the referral registers and counted the days from the time the member was referred to work until he next registered for employment. Based upon an assumption that the individual was working during this entire period of time the Board projected earnings based upon a per diem rate. An average amount of days worked was, thereafter, calculated and that figure was then multiplied by the number of local members, ranging in varying years from 120 to 147 members, in order to establish the purported total earnings of Local 480 members. Again, no actual earning figures were reviewed in order to arrive at the Board's calculation.

(b) the Board did not have in its possession any records dealing with the actual earnings of

the vast majority of non-local members which it contends were discriminated against. The only earning records that the Board possessed pertained to eight individuals who had filed charges with the Board, either in this matter or in other matters. No attempt had been made by the Board to contact the remaining 129 individuals which it contends are "similarly situated" in order to establish an average earnings figure or interim earnings figures. Thus, for the year 1978, the Board projected an earnings figure based upon an average figure utilizing only two of the alleged 137 discriminatees. Again, no meaningful earnings figures were utilized in order to arrive at the Board's calculation.

8. The reason for the issuance of this deficient specification is that the Board had not, after approximately a three and one-half year period, reviewed any earnings records regarding Local 480 referrals. In approximately late November/early December 1982, the Board initiated a half hearted attempt to review the earnings information in the possession of the Fringe Benefit Funds of the District Council of Ironworkers of Northern New Jersey. The Board was informed by Donald E. Morrice, Esq., attorney for the Funds, by letter dated December 9, 1982 (attached hereto as Exhibit "B") that a subpoena or court order would be necessary in order for Fund records to be produced. The Board failed to issue the requested subpoena prior to the filing of its specification. In fact, the requested subpoena was not issued by the Board until February 1, 1983 (copy annexed hereto as Exhibit "C"). It should herein be noted that the

Board established May 16, 1983 as the hearing date for the backpay issues to be resolved. Upon information and belief, it appears to be the intention of the Board to amend its backpay specification an [sic] order to bring it into conformity with Board rules and regulations; thus, circumventing the court imposed deadline for issuing the backpay specification.

9. The Board has, in fact, conceded that the instant specification is deficient. By letter dated December 14, 1982 (copy annexed hereto as Exhibit "D") the Board's Regional Director, Arthur Eisenberg, informed me that the "Ironworkers Pension and Welfare Fund has refused to allow us access to their records to obtain hours/earnings information which is *essential* for computing backpay in accordance with the formula set forth in the Board's Order." (emphasis added). Mr. Eisenberg concluded as follows:

> . . . we intend to issue a specification based upon the best information we have available. If you have better information to give us, or can obtain better information for us from the Fund, we ask that you do so immediately upon receipt of this letter.

I responded to Mr. Eisenberg by letter dated December 21, 1982. Copy of this letter is annexed hereto as Exhibit "E". In my response, I reminded Mr. Eisenberg that as long ago as January 1980, we had informed the Board that the Pension and Welfare Fund information was not under the custody or control of Local 480, but was administered by a separate entity, concluding that:

> Despite this advice, the Board made no attempt over the intervening years to either procure or review the Fund records until the half hearted

> attempt of earlier this month. Any problems with the Fund attorneys regarding the production of records *could* and *should* have been resolved years ago. There exists, therefore, no valid excuse for the Board's failure to issue a proper backpay specification. . . . Under the circumstances, therefore, please be advised that we will regard the issuance of any backpay specification which is not in full accord with Board Rules and Regulations as contumacious of the outstanding Third Circuit Order.

10. In order not to waive Respondent's rights on the Board proceedings, we filed an Answer to the backpay specification on January 5, 1983. (A copy of our Answer is annexed hereto as Exhibit "F"). This pleading attempted to delineate as much as possible the many flaws and deficiencies in the Board's specification. By letter dated January 27, 1983, we received notice that the Board considered our answer deficient. (Copy of letter annexed hereto as Exhibit "G"). In effect, the Board seemed to be shifting the burden upon Respondent to arrive at a backpay specification in accordance with the Board's Rules and Regulations. The Board extended the time for Respondent to file an amended answer until March 31, 1983.

11. At our meeting, Mr. Burke estimated the total backpay liability of Local 480 to be approximately 1.2 million dollars. This figure includes backpay, interest and fringe benefit payments. Contrasted with this staggering liability is the relatively minimal backpay amounts alleged by the Board to be due and owing to the five identified charging parties. These amounts are as follows:

| | |
|---|---|
| Ronald Cron | $1,952.00 |
| Robert Dailey | 2,413.00 |
| Daniel Dietz | 1,685.00 |
| Edward Korab | -0- |
| Walter Serafin | 1,656.00 |
| | $7,706.00 |

12. Local 480 is a small ironworkers local whose hiring hall is located in a leased second floor walk-up facility on Elizabeth Avenue, Elizabeth, New Jersey. The local owns no real estate nor does it possess any other significant assets. The local cannot afford even the legal expenses involved in a protracted backpay litigation, much less the payment of a one million dollar liability. For the first time since these proceedings were filed in January, 1977, Local 480 has been apprised of the identities of the alleged discriminatees, as well as the amount of the potential backpay award. It is Respondent's position that the extension of liability from approximately $7,700.00 to $1.2 million is punitive in nature, confiscatory, and not in furtherance of the purposes underlying the Act. Now that the ramifications of the "similarly situated" category are fully appreciated, this court should modify the backpay order to exclude "similarly situated" individuals.

13. This affidavit is made, therefore, in support of Respondent Local 480's motion for partial relief of the Judgment-Order in this matter dated May 11, 1979, as amended by Order dated December 1, 1982.

NOLAN, O'NEILL & MOORE
Attorneys for Respondent,
Local 480

By /s/ John J. Mulvihill
JOHN J. MULVIHILL

Sworn and subscribed to before me this —— day of February, 1983.

Kathleen Sparrowe

KATHLEEN SPARROWE
Notary Public of New Jersey
My Commission Expires April 24, 1985

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2014

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO, RESPONDENT

## OPPOSITION OF NATIONAL LABOR RELATIONS BOARD TO MOTION FOR PARTIAL RELIEF FROM JUDGMENT

The National Labor Relations Board hereby opposes the motion of International Association of Bridge Structural and Ornamental Ironworkers Local 480, AFL-CIO for partial relief from the Court's Judgment-Order for the reasons set forth in the attached Memorandum and supporting affidavits and exhibits.

WHEREFORE, it is respectfully requested that the motion for partial relief from judgment be denied.

Respectfully submitted,

/s/ Elliott Moore
ELLIOTT MOORE
(by EGM)
Deputy Associate
General Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated: Washington, D.C.
March 31, 1983.

EXHIBIT A

STATE OF NEW JERSEY )
) ss:
COUNTY OF ESSEX )

RE: NO. 78-2014—International Association of Bridge, Structural and Ornamental Ironworkers, Local 480, AFL-CIO (3rd Circuit) Board Case No. 22-CB-3432

AFFIDAVIT

My name is EDWARD J. PETERSON and I am the Compliance Supervisor of the Newark Regional Office of the National Labor Relations Board, which is located at 970 Broad Street, Room 1600, Newark, New Jersey 07102.

1. I have been involved either directly as a Board Agent or indirectly as a supervisor in the compliance and backpay aspect of the above-captioned case. I have read Local 480's Motion for Partial Relief From Judgment, and this affidavit is provided as a response in part to that Motion.

2. Immediately upon receiving notice that we would have to issue a backpay specification for the Local 480 case by no later than December 31, 1982, we began to work toward that goal. As noted in previous affidavits to this court, we had originally planned to issue a specification which would have consolidated all the current pending Ironworker cases of this type, which are in the backpay stage.

3. It was necessary to break-out and collate certain computer-run records and to compile a separate list of names of all the discriminatees for the Local 480 case, as well as a separate list of all those who

used the Local 480 hall for the time period involved.

4. Since the Ironworkers Pension and Welfare Fund (hereafter Fund) required specific names and time periods as a prerequisite to allowing inspection of their records, the above process of compiling the lists of names had to be complete before any request for information from the Fund would have been honored.

5. On or about November 29, 1982, Board Agent Gregory Burke spoke by telephone to Fund Attorney Thomas Jardine, explained the necessity and urgency for access to Fund records and made a request for those records.

6. By letter dated November 29, 1982, Mr. Jardine responded to the request by asking for more precise detail as to the background of the cases and the information we were requesting.

7. By letter from this office dated December 2, 1982, Mr. Jardine was provided with copies of all prior Board and Court Orders as background material, and additionally he was provided with a list of over 350 names and specific time periods for which information was requested.

8. By letter dated December 9, 1982, Mr. Jardine notified this office that the Fund would not supply the requested information without a subpoena or Court Order, requiring production of the records.

9. By letter dated December 13, 1982, Local 480 attorney John Mulvihill notified Mr. Burke that he had informed the Funds' attorneys that Local 480 had no objection to production of the Pension and Welfare records. Also, a copy of this letter was sent to the Fund's attorney.

10. All along during the prior processing of this case the Board has been lead to believe that the Fund

would allow us access to their records, as long as the Local involved did not object to the production of the records.

11. As I noted in a prior affidavit to this Court regarding a motion filed by Ironworkers Local 373, this office made a request for Pension and Welfare records as long ago as 1979. At that time, Fund Attorney Jardine sent me a letter dated February 27, 1979, assuring me that the Fund would produce the records, as long as the Local Unions did not object. He specifically stated in that letter that the need for a Court Order requiring production of the records would arise only if the Local Unions objected to their production.

The following is a relevant quote from that letter (Emphasis added):

> However, our problem is in identifying the specific ironworkers with respect to whom wage information is requested. Our records do not show what local union member affiliation a particular ironworker may have nor do we know from what Union hiring hall he may have been referred for a given job. *However, if you will provide us with names and time periods we will make available whatever information you may request, provided no objection has been registered with respect to such disclosures from the attorneys representing the local unions in these cases. Should there be objections, we request that our instructions be embodied in an Order of the Court.*

Thus, the Funds change in position as expressed in its letter dated December 9, 1982 requiring a subpoena or Court Order for production of records, *notwithstanding* the lack of any objection by the Local

Union put the Board in an untenable position, coming as it did, at a time when we were faced with a deadline of December 31, 1982 for issuance of the Local 480 specification.

12. Faced with the possibility of protracted litigation in subpoena enforcement or other formal proceedings, the outcome of which was uncertain the Region determined that there simply wasn't enough time to resolve that issue, inspect the Fund records (if we obtained access) and put together a backpay specification before the deadline of December 31.

13. By letter dated December 14, 1982, the Region notified Mr. Mulvihill of this dilemma, and of our intention to issue a specification based on the best information available to us at that time. A backpay specification issued on December 21, 1982.

14. Since the Fund's records were the only central source of earnings information for the individuals using Local 480's hiring hall, and since the formula for computing backpay contained in the Board's Order necessitated using the earnings of all those who were referred out of the hall to obtain an average earnings figure, we realized that we could not issue a specification based on actual earnings records by December 31, due to the problem in gaining access to Fund records.

15. Considerable time, effort and expense had been expended on the Ironworkers backpay cases, including the Local 480 case and to fail to issue a specification within the time period required simply because the Fund had refused access to the records, was not even considered.

16. We determined that we would issue a specification based on the earnings information we had available, and utilizing a formula based on estimations

and projections of the earnings of those whose records we could not see. The use of such a formula has been found to be valid in other cases, and under the circumstances of this case was proper.

A brief explanation of the formula used in that Specification is as follows:

(a) By using a sampling formula, we obtained the average number of days worked during each year of the backpay period for a sample group of members and another sample group of non-members. We used only Local 480 referrals or earnings in these computations.

(b) We then computed the average daily earnings for each year of the non-member sample group by dividing their total actual gross earnings by the average number of days worked for that group.

(c) Using this average daily earnings figure, we then projected the average yearly gross earnings of each group by multiplying the average daily earnings by the respective average number of days worked for each year for each group of member and non-member applicants.

(d) By multiplying the average gross earnings per individual for each group times the actual number of applicants, we obtained the total earnings for each group per year. We then divided the total earnings for both groups by the total number of applicants member and non-member, for that year to obtain the gross backpay for that year.

(e) We took into account the known interim earnings and projected them in a similar manner, subtracting them from gross backpay to obtain adjusted gross backpay and then net backpay.

17. It should be noted that at the time we issued the backpay specification the result of any litigation

to obtain Fund records was uncertain, and there existed the possibility that we could *never* use Fund records to support a specification. Therefore, we felt it to be imperative that we issue the best specification we could in the time allotted. Local 480 would have an opportunity to contest the specification for whatever reason, at the backpay hearing.

18. After the specification was issued, we began formal steps to obtain access to the Fund records. After obtaining authorization from our Washington office, we issued a subpoena for Fund records. The Fund did not oppose the subpoena and enforcement proceedings were not necessary.

19. Mr. Burke invited Mr. Mulvihill to our offices and they met on February 18, 1983. At that time Mr. Burke explained in detail the basis of our outstanding specification, and offered Mr. Mulvihill the opportunity to review the computer analysis records which were used to support our backpay claims, as well as all other materials, including calculations, used to prepare the specification. Mr. Burke also notified Mr. Mulvihill at that time that we had gained access to Fund records, and were actively preparing an amended specification based on the actual earnings records of the Fund, and utilizing the Board prescribed backpay formula. Mr. Mulvihill was told that upon request, we would issue subpoenas to him to allow him similar access to Fund records to prepare his response.

20. The amended specification issued on March 11, 1983, and the result was a 30% reduction in our backpay claim. In preparing the amended specification we re-computed all our figures using the Board prescribed backpay formula. We obtained the average earnings of all those who used the Local 480 hiring

hall during the relevant period by using the actual earnings as shown in the pension and welfare records.

We subtracted all earnings (District Council earnings) shown for each claimant as interim earnings and any other interim earnings, if known. Within the next day or so we will issue a letter soliciting the cooperation of all claimants and requesting interim earnings information. Mr. Mulvihill is also aware that he may subpoena claimants to obtain interim earnings information. As of this date he has requested one subpoena for access to Fund records, but none for interim earnings purposes.

21. On several occasions we have made efforts to settle the pending Ironworkers cases including the Local 480 case. We have expressed willingness to accept less than our estimated "100%" claim and to take into account the Union's ability to pay. Mr. Mulvihill has never responded in any substantive way, has refused to open the Union's books and records to cooperate in an ability-to-pay investigation, and has never made any settlement offers or proposals short of eliminating the similarly situated category of discriminatees. We stand ready now, as in the past, to discuss reasonable settlement proposals.

I have read this statement consisting of four pages, including this page, I fully understand its contents, and I certify that it is true and correct to the best of my knowledge and belief.

/s/ Edward J. Peterson
EDWARD J. PETERSON
Compliance Supervisor
National Labor
Relations Board
Twenty-Second Region
970 Broad Street
Newark, New Jersey 07102

Sworn and subscribed to before
me this 28th day of March, 1983.

/s/ Collette Sarro
COLLETTE SARRO
A Notary Public of New Jersey
My Commission Expires June 17, 1987

EXHIBIT B

STATE OF NEW JERSEY )
) ss:
COUNTY OF ESSEX )

RE: No. 78-2014—International Association of Bridge, Structural and Ornamental Ironworkers, Local 480, AFL-CIO (3rd Circuit) Board Case No. 22-CB-3432

AFFIDAVIT

My name is EDWARD J. PETERSON and I am the Compliance Supervisor of the Newark Regional Office of the National Labor Relations Board, which is located at 970 Broad Street, Room 1600, Newark, New Jersey 07102.

1. I have been involved either directly as a Board Agent or indirectly as a supervisor in the compliance and backpay aspect of the above-captioned case, as well as the cases involving Ironworkers' Locals 373 and 45.[1] I have read Local 480's Motion For Partial Relief From Judgment, and this affidavit is provided as a response in part to that motion.

2. Following the Court's enforcement of the Board's Decision and Order in this case in May of 1979, Regional Office personnel, including myself, met several times with Local 480 officials to discuss the compliance aspects of this case. In arranging these meetings, I dealt with Local 480's attorney John Mulvihill and after several general compliance meetings, arrangements were made to examine and handcopy the Union's referral records to begin backpay computations. In December and January of 1980, myself or

[1] *International Association of Bridge, Structural, and Ornamental Ironworkers*, Locals 373 and 45, Civil Nos. 78-1085, 78-1086, 78-1435, 78-1572.

another agent who was assisting me in this case, specifically requested Local 480, through Mr. Mulvihill, to allow us to photocopy or Xerox relevant referral books to expedite the backpay computations. The Union, through Mulvihill, flatly refused to permit photocopying of their records. The Union stated that, in its opinion, allowing inspection and handcopying at its premises complied with the Court's Order. The Union appeared to be motivated by a desire to obstruct the Region's efforts to reach a backpay determination. I say this because later, in October 1980, without explanation, the Union changed its position and allowed Board Agents to photocopy Local 480 referral records.

Because of the Local's refusal to allow photocopying of its records, in February 1980, another agent and myself, spent many hours at Local 480's hiring hall over a span of several weeks handcopying referral records to be used in later analysis.

3. During the initial compliance meetings with the Union, an examination of the referral records showed that it would be necessary to analyze five full and two partial volumes of Local 480's referral registers to determine the backpay amounts owing to the discriminatees. These volumes each contain 50 pages, each page with 16 entries of referral applicants with their respective sign-up date, skills, Local membership, race, job referred to, skill referred to, plus any special exception to the first-in, first-out referral practice.

Each line of each referral book must be analyzed for content, and the results selectively recorded. For each non-local applicant, we must record the name, local affiliation, date of registration, type of work sought, date of referral and type of work assigned. We must then search through all subsequent entries up to the date of referral of the potential discrimi-

natee, to ascertain if any local member who had registered later had been referred ahead of the non-local applicant to a type of work which he could have performed. Special consideration must be given to any remarks which purportedly justify certain out-of-order referrals. (In Local 480's case, out-of-order referrals for the purpose of serving as a "steward" were found to be unlawful. In the cases involving Locals 45 and 373, all out-of-order referrals for any reason must be listed.)

Each such "passover" must then be listed with the above noted information for each non-local man. In some instances, a non-local man was passed over by 50 local men before he was referred to work.

4. In October 1980, Board Agent Gregory Burke of this Regional Office, who was specifically assigned to spend the majority of his time working on the Ironworkers' backpay computations, visited Local 480's offices and examined the referral records prior to photocopying. Upon this examination, it was determined that the period for which Local 480 should be responsible for backpay was from July 17, 1976, the beginning of the 10(b) period, to on or about December 31, 1979 [sic], after which time it appeared no out-of-order referrals had occurred.

5. Also during that same period of time, since the Court's enforcement of the Board's Decision in Local 480 (78-2014), this Region has been responsible for the backpay compliance processing for the Board's Decision and Orders against Ironworkers' Local 373 and 45 (Case citations noted above in Footnote 1), which were enforced by the United States Court of Appeals for the Third Circuit shortly before the Board's Order against Local 480 was enforced. In each of those cases, the Board's Order as enforced by the Court, also required the Board's Regional Office

to first identify all the similarly situated employees and then to determine the appropriate backpay amounts for these employees, plus the identified discriminatees.

To secure backpay for the Local 45 and Local 373 Ironworkers' case, it has been necessary for this Region's Compliance Section to examine and analyze 49 books of Union referral registers, each register comprised of 50 pages and 16 entries of each page for a total 2,450 pages of referral registers in order to determine the appropriate amounts.

6. Also during the same time I was directly involved in the investigation, litigation and settlement of the contempt proceedings in this Court against Ironworkers' Locals 45 and 373 (Civil No. 79-2451). These contempt proceedings concern the refusal by those Unions to permit the Board to photocopy the referral registers.

7. In order to avoid favoring any one Respondent Ironworker Local, and to more efficiently organize the Region's Compliance efforts, the Region has attempted to perform the backpay work for all of these Locals at the same time.

8. During the periods since the Court's enforcement of the Board's Decision and Order in Local 480, this Region's Compliance Section has also been responsible for processing a very large number of backpay compliance cases. This volume is reflected in the following summary:

| Year | Number of Litigated Cases Closed | Amount of Backpay Computed and Distributed |
|---|---|---|
| 1979 | 14 | $170,434.21 |
| 1980 | 24 | $251,348.21 |
| 1981 | 23 | $130,667.27 |
| 1982 | 4 | $ 98,916.00 |

All of the above cases had to be handled at the same time by the same Regional personnel as were responsible for the backpay compliance work in the cases involving not only Local 480 but all of the other Ironworkers' Locals as well.

The foregoing numbers indicate only those litigated cases in which the compliance personnel directly computed backpay. The total number of compliance cases of all types which were processed during the period January 1979 to March 1982 was 393, and the total amount of backpay distributed was $2,819,809. Obviously, there is a tremendous amount of compliance work in addition to the backpay computations we perform. This work includes overseeing reinstatement offers, monitoring Notice postings, investigating complaints of non-compliance, monitoring bargaining order cases, and involvement in backpay hearings, enforcement, contempt, or bankruptcy litigation, just to name a few of the compliance related duties.

9. Meanwhile, in or around August 1979, this office decided that to facilitate the analysis of the extremely large amount of referral register records, it would be desirable to secure the use of computers. Once the computer project got on track, Board Agent Gregory Burke was assigned to spend the majority of his time working on this case.

10. To complete the backpay computations, it will be necessary to extract wage information from the Pension and Welfare Fund records of Local 480 as well as the other Ironworkers' Locals. All the Locals, including 480, have stated affirmatively in the past that they have no objection to the Region examining Pension and Welfare records to obtain this wage information. Additionally, the Pension and Welfare Fund has stated affirmatively that it will provide such

information as long as the Locals do not object. If the parties continue to cooperate in this matter, the Region is confident that it will be able to expeditiously complete the backpay computations through the use of wage information from the Pension and Welfare records. We are also confident that we can determine the average amount of income earned by job applicants who received referrals from Local 480's hiring hall during the backpay period.

11. In October 1981, the Region called a meeting with representatives and/or attorneys of the various Locals involved in these Ironworkers' cases, including Local 480 and its attorney Mr. Mulvihill. The meeting was held on October 21, 1981, and the purpose of the meeting was to discuss ways of seeking a more expeditious resolution to the backpay remedy in these cases. The Locals were asked to provide the Region with access to their financial records (I.R.S. returns, etc.) to allow us to consider some kind of lump sum settlement based on the Locals' ability to pay. Mr. Mulvihill, representing both Local 373 and Local 480, refused to provide the Region with any financial documents, preferring instead to tell the Region that it should seek out public documents on the Union's finances, and by doing so, he effectively ended settlement discussions on that basis.

12. Despite some setbacks, we are committed to proceeding ahead with this project and fully intend to complete it and provide Local 480 and the other Locals with detailed information as to the names of the backpay claimants and the amounts being claimed.

I have read this statement consisting of three pages, including this page, I fully understand its contents, and I certify that it is true and correct to the best of my knowledge and belief.

Sworn and subscribed to before
me this 5th day of May, 1982.

/s/ Collette Sarro
COLLETTE SARRO
A Notary Public of New Jersey
My Commission Expires June 17, 1982

/s/ Edward J. Peterson
EDWARD J. PETERSON
Compliance Supervisor
National Labor
Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

EXHIBIT C

STATE OF NEW JERSEY )
) ss:
COUNTY OF ESSEX )

RE: No. 78-2014—International Association of Bridge, Structural and Ornamental Ironworkers, Local 480, AFL-CIO (3rd Circuit) Board Case No. 22-CB-3432

AFFIDAVIT

(1) My name is Gregory M. Burke. I am an employee of the National Labor Relations Board, serving as a Field Examiner in the Newark Regional Office.

(2) In mid-1979, I had been assigned to perform compliance duties. My immediate supervisor was Edward J. Peterson, who had assigned me to work on the Ironworkers cases. At various times in 1979 I visited the Local 373 hiring hall in Perth Amboy, New Jersey, to copy, and to extract information from, the Local's referral registers.

(3) In or around August, 1979, I suggested the use of computer support in the preparation of a backpay specification. I was instructed to obtain information and determine the feasibility of such support. I contacted several sources of computer services, including the General Services Administration (GSA). After a number of meetings and discussions, it appeared that computer support in analysis of the referral registers was feasible.

(4) At various times in September and October, 1979, I met with, *inter alia*, Mr. Peterson and Regional Director Arthur Eisenberg. I proposed the use of computer analysis, and also proposed the eventual issuance of one backpay specification including Locals 45, 373 and 480, and including Locals 11 and 483 if

and when the Board Order involving those locals was enforced. My proposal was adopted as the Regional determination of how to proceed in these cases.

(5) On or about October 18, 1979, I prepared a memorandum for Mr. Peterson's signature, addressed to Mr. Eisenberg, delineating the advantages of computer assistance. On or about October 23, 1979, Mr. Eisenberg transmitted the memorandum to the Office of the General Counsel, Division of Operations Management, for approval and allocation of funds. On or about December 20, 1979, the Regional Office was given authority to expend $15,000 for computer support.

(6) On various dates in and around April and May, 1980, I met with representatives of the subcontractor who was to keypunch the information from the referral registers onto cards, and with representatives of Brookhaven National Laboratory (BNL), which was the subcontractor providing the computer programming and processing services. I established the requirements to be met, and set up the format for the punched cards. Two test batches of information were processed successfully.

(7) The computer procedures began with copies of the referral registers. Since the original registers were filled out individually by registrants seeking employment, there was a wide variation in clarity and legibility of entries. Accordingly, editing of the registers prior to keypunching was required. Several NLRB employees, including Mr. Peterson, myself, and two temporary employees hired specifically for the project, spent several months editing Xerox copies of the referral registers of Locals 45, 373, and 480, which we had been given permission by the locals to make. The editing process included printing any illegible signatures or other entries, so that they could

be understood by the keypunch operators, and coding entries for types of work sought, assignments made, and remarks. The purpose of the coding was to allow machine comparison of jobs sought against jobs assigned, which necessitated that each be identified identically. As the registers were coded, they were transmitted to GSA in batches for keypunching.

(8) In December 1980 and January 1981, the punched cards were transported to BNL for processing. The finished printouts, consisting of 10,124 pages, were returned to us at times in January and February 1981. These printouts list, by local union, all registrants who used a particular hiring hall, both members and non-members, as well as all non-member registrants who were passed over by local members in referrals. Thus, all of the potentially "similarly situated" discriminatees have been identified for Locals 45, 373, and 480.

(9) After receipt of the printout I began to analyze and consolidate the information provided into the beginnings of the backpay specification. At this time, I discovered an error which had been theretofore undetected. The keypunch operators, in punching the cards, had typed a space between job codes rather than run the codes together as per the sample runs. The result was that as many as half the jobs sought by a registrant would be disregarded and not considered in the printout of potentially unlawful passovers. I reported my findings immediately to Mr. Peterson and to Mr. Eisenberg.

(10) Thereafter, I informed GSA that the product failed to meet specifications. GSA responded that the problem was not their fault, and that, in addition, they had exceeded the authorization of $15,000. GSA requested an additional $10,000 to pay for the work already done, to correct the errors, and to complete

the project. On or about May 18, 1981, I prepared a memorandum to Mr. Eisenberg delineating the problem, and suggesting that he seek assistance from the Office of the General Counsel. On or about June 15, 1981, Mr. Eisenberg transmitted my memorandum to Washington.

(11) On or about August 11, 1981, I prepared an informal memorandum to Mr. Eisenberg, informing him that we had received no answer to our June request. Mr. Eisenberg called Washington and obtained verbal authority to expend the $10,000.

(12) On various dates in September and October 1981, I spoke with John Craner, attorney for approximately 121 iron workers (who are both named and unnamed discriminatees in the various cases), concerning possible settlement of all of the Iron Workers cases. On or about October 21, 1981, a meeting was held in the Regional Office, which was attended by Mr. Pascarell, the Regional Attorney, Mr. Peterson, Mr. Craner, Mr. Mulvihill and myself. At this meeting, various settlement methods were proposed. Mr. Mulvihill represented that he would seek a decision from his clients, Local 373 and Local 480, and inform the Region. Based upon this representation, further work on the computer project was held in abeyance.

(13) On or about January 19, 1982, having heard neither acceptance nor refusal from Mr. Mulvihill, I prepared a letter for Mr. Eisenberg's signature soliciting Mr. Mulvihill's response. On or about January 27, 1982, Mr. Mulvihill replied to the letter. In his reply, he did not agree to any specific settlement or type of settlement, but rather asked the Region to propose a settlement figure for his client's approval. Further, Mr. Mulvihill in essence withdrew his prior

agreement to provide the Region with financial data concerning the ability of his clients to pay, and suggested use of public documents for financial information.

(14) On or about February 11, 1982, I prepared a memorandum for Mr. Eisenberg's signature, requesting reallocation of the $10,000 previously authorized from current fiscal year funds. Verbal reallocation was received on April 30, 1982.

(15) Because of the fact that all potential instances of discrimination have not been identified due to the keypunch error, the computer printouts produced to date are not reliable to identify the periods of discrimination for each discriminatee. New cards have already been keypunched. BNL will be able to begin reprocessing in approximately two months, and it will take between two weeks and one month to produce new printouts. Since as many as half of the unlawful passovers may have been disregarded, the new printouts are estimated to consist of approximately 18,000 pages.

(16) As soon as the printouts are available, they will be analyzed and edited by Board Agents. Any non-local members who were not passed over will be eliminated from the list. Those who were passed over will be listed by calendar quarter, which will establish the backpay period for each. This process is estimated to take approximately one month. A consolidated list of all who signed the registers, members and non-members alike, by year, will then be transmitted to the Pension and Welfare Fund with a request for the earnings records of each. Upon receipt of the earnings records, the backpay formula prescribed by Judge Ricci, which was adopted by the Board and enforced by the Court, will be used to determine gross backpay.

(17) For each year, the total earnings of all who signed the register will be divided by the total number of individuals involved. The resulting average will be the gross backpay. Then, for each identified discriminatee, actual earnings will be deducted from gross backpay, by calendar quarter. The result will be net backpay, which may be further reduced by other interim earnings, or increased by offset of additional expenses against interim earnings. This process is estimated to take approximately two to three months, as all calculations will be documented separately for purposes of the backpay specification. When net backpay has been calculated, the backpay specification will be prepared and issued. This final process is estimated to take approximately one week.

(18) Summarizing the individual elements involved, with minor allowances for transitions between phases, assuming the occurrence of no unforseen circumstances, and with the continued cooperation of the local unions and the Pension and Welfare Fund, the total time required to issue a backpay specification should be approximately eight months.

I have read this statement consisting of five pages, including this page, I fully understand its contents, and I certify that it is true and correct to the best of my knowledge and belief.

/s/ Gregory M. Burke
GREGORY M. BURKE
Field Examiner
National Labor
Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

Sworn and subscribed to before
me this 5th day of May, 1982.

/s/ Collette Sarro
COLLETTE SARRO
Notary Public
My Commission expired [sic] on June 17, 1982.

EXHIBIT D

STATE OF NEW JERSEY )
) ss:
COUNTY OF ESSEX )

RE: No. 78—2014 International Association of Bridge, Structural and Ornamental Ironworkers, Local 480, AFL-CIO (3rd Circuit) Board Case No. 22-CB-3432

AFFIDAVIT

(1) My name is Gregory M. Burke. I am an employee of the National Labor Relations Board, serving as a Field Examiner in the Newark Regional Office.

(2) In mid-1979, I had been assigned to perform compliance duties. My immediate supervisor was Edward J. Peterson, who had assigned me to work on the Ironworkers cases. In or around August, 1979, I suggested the use of computer support in the preparation and the eventual issuance of one backpay specification including Locals 45, 373 and 480, and including Locals 11 and 483 if and when the Board Order involving those locals was enforced. My proposal was adopted as the Regional determination of how to proceed in these cases.

(3) On or about December 20, 1979, the Regional Office was given authority to expend $15,000 for computer support. On various dates in mid-1980, several NLRB employees, including Mr. Peterson, myself, and two temporary employees hired specifically for the project, completed the necessary editing of the raw data to allow machine processing. The finished printouts, consisting of 10,124 pages, were returned to us at times in January and February 1981. These printouts list, by local union, all registrants who used a particular hiring hall, both members and non-

members, as well as all non-member registrants who were passed over by local members in referrals. Thus, all of the potentially "similarly situated" discriminatees have been identified for Locals 45, 373, and 480.

(4) After receipt of the printout, I discovered an error, therefore undetected, which rendered the printouts unreliable, as they did not list as many as half of the potential violations.

(5) On various dates in September and October 1981, I spoke with John Craner, attorney for approximately 121 iron workers (who are both named and unnamed discriminatees in the various cases), concerning possible settlement of all of the Iron Workers cases. On or about October 21, 1981, a meeting was held in the Regional Office, which was attended by Mr. Pascarell, the Regional Attorney, Mr. Peterson, Mr. Craner, Mr. Mulvihill and myself. At this meeting, various settlement methods were proposed. Mr. Mulvihill represented that he would seek a decision from his clients, Local 373 and Local 480, and inform the Region. Based upon this representation, further work on the computer project was held in abeyance.

(6) On or about January 19, 1982, having heard neither acceptance nor refusal from Mr. Mulvihill, I prepared a letter for Mr. Eisenberg's signature soliciting Mr. Mulvihill's response. On or about January 27, 1982, Mr. Mulvihill replied to the letter. In his reply, he did not agree to any specific settlement or type of settlement, but rather asked the Region to propose a settlement figure for his client's approval. Further, Mr. Mulvihill in essence withdrew his prior agreement to provide the Region with financial data concerning the ability of his clients to pay, and suggested use of public documents for financial information.

(7) On May 3, 1982, the Region received authorization to expend current fiscal year funds to continue the computer project. I immediately notified GSA, and I was informed in turn that BNL, our data processing source, would be unable to resume processing for approximately two months, due to assignment of our processing point of contact to another project which had priority. I suggested the use of another source to save time, but was informed that the start-up time with another source would use up more than half of the anticipated delay, while the cost for a commercial source would be about $150,000. Based upon the foregoing, the Regional Director determined to wait two months.

(8) In mid-July, 1982, I spoke with our point of contact at BNL, who informed me that she was ready to reactivate the project as of the end of July. However, BNL had replaced its computer system, and it was necessary to adapt the former program to the new system, as the two were not compatible. At the end of July, 1982, I hand-carried the corrections to the previous data to BNL for processing. At various times since, I have received printouts of data errors needing corrections, and have updated and returned them. The additional delay in restarting the work together with the extensive process of transfer of data and reprogramming, added an additional three month delay. The program is now almost ready for its final run.

(9) It is expected that corrected printouts will be received in approximately one month. As soon as the printouts are available, they will be analyzed and edited by Board Agents. Any non-local members who were not passed over will be eliminated from the list. Those who were passed over will be listed by calen-

dar quarter, which will establish the backpay period for each. This process is estimated to take approximately one month. A consolidated list of all who signed the registers, members and non-members alike, by year, will then be transmitted to the Pension and Welfare Fund with a request for the earnings records of each. Upon receipt of the earnings records, the backpay formula prescribed by Judge Ricci, which was adopted by the Board and enforced by the Court, will be used to determine gross backpay.

(10) For each year, the total earnings of all who signed the register will be divided by the total number of individuals involved. The resulting average will be the gross backpay. Then, for each identified discriminatee, actual earnings will be deducted from gross backpay, by calendar quarter. The result will be net backpay, which may be further reduced by other interim earnings. This process is estimated to take approximately two to three months, as all calculations will be documented separately for purposes of the backpay specification. When net backpay has been calculated, the backpay specification will be prepared and issued. The final process is estimated to take approximately one week.

(11) Summarizing the individual elements involved, with minor allowances for transitions between phases, assuming the occurrence of no unforseen circumstances, and with the continued cooperation of the local unions and the Pension and Welfare Fund, the total time required to issue a backpay specification should be approximately six months.

(12) In connection with Respondent's Motion for Modification filed on April 28, 1982, I prepared and submitted an affidavit dated May 5, 1982. I have reviewed that affidavit, and certify that its contents are true to the best of my knowledge and belief.

(13) Until receipt of a copy of Respondent's Motion for Partial Relief From Judgment dated September 28, 1982, Regional office personnel, including myself, were unaware that the Court had issued its May 13, 1982, order, denying Respondent's April 28, 1982 motion, but establishing a 90 day period to clarify the situation.

(14) In his affidavit and memorandum of law in support of his motion, Mr. Mulvihill raises several points which require clarification. As Mr. Mulvihill notes, his letter to the Regional office dated January 27, 1982 was written in response to a letter from the Regional office dated January 19, 1982. Since Mr. Mulvihill was no longer willing to settle on the terms as discussed, no reply to his letter was deemed necessary.

(15) In footnote 1 of his memorandum of law, Mr. Mulvihill states that the Board recently investigated Local 480's referral registers. He neglects to mention that this investigation was triggered by the filing, on June 7, 1982, of an unfair labor practice charge alleging that Local 480 has continued to operate its hiring hall in a discriminatory manner. The investigation revealed evidence that Local 480 is referring favored employees to jobs without the use of the referral registers, and the Region has recommended that the Board authorize initiation of contempt proceedings.

(16) It should also be noted that granting the Respondent's request for partial relief could result in serious harm to numerous heretofore unnamed discriminatees. At various times after issuance of the Board's orders in the several Iron Workers cases, individuals telephoned or presented themselves at the Regional office seeking to file their own charges

against the local unions, including Local 480. Some individuals filed charges which were held in abeyance in the Region. Others were discouraged from filing individual charges, and were told that there was no necessity to do so, as they were fully covered by the outstanding Board Orders. While this practice of discouraging filings has since ceased, it is possible that discriminatees would be precluded under Section 10 (b) of the Act from obtaining any relief, although they did seek to file charges.

I have read this statement consisting of four pages, including this page, I fully understand its contents, and I certify that it is true and correct to the best of my knowledge and belief.

/s/ Gregory M. Burke
GREGORY M. BURKE
Field Examiner
National Labor
Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

Sworn and subscribed to before me this 20th day of October, 1982.

/s/ Collette Sarro
COLLETTE SARRO
Notary Public
My Commission expires on
June 17, 1987.

EXHIBIT E

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTY-SECOND REGION

---

Case No. 22-CB-3432

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL & ORNAMENTAL
IRONWORKERS, LOCAL 480, AFL-CIO

and

JOHN A. CRANER, ATTORNEY

and

BUILDING CONTRACTORS ASSOCIATION
OF NEW JERSEY
PARTY TO THE CONTRACT

---

## BACKPAY SPECIFICATION AND NOTICE OF HEARING

The National Labor Relations Board, having on May 9, 1978, issued an Order in the above-captioned case, directing Respondent Local 480, International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO to make whole Ronald Cron, Robert Dailey, Daniel Dietz, Edward Korab, Walter Serafin, and all other nonmember applicants who were similarly situated for their losses resulting from Respondent's unfair labor practices in violation of Sec-

tion 8(b)(1)(A) and (2) of the Act, the Court of Appeals for the Third Circuit having on June 4, 1979 entered its Judgment enforcing the Board's Order herein, and controversy having arisen over the amount of backpay due under the terms of the Board's Order, the Regional Director of the National Labor Relations Board for Region 22, pursuant to authority duly conferred upon him by the Board, hereby issues this Backpay Specification and alleges that the backpay due under the Board's Order, as enforced by the Court of Appeals for the Third Circuit, is as follows:

1. The backpay period for each discriminatee begins on the first day said discriminatee was denied referral to employment (passed over) in favor of a member of Respondent and runs until the end of that calendar quarter. Thereafter, each discriminatee is due backpay for each subsequent calendar quarter in which a passover occurred. The backpay period for each discriminatee ends at the end of the calendar quarter in which the discriminatee was last passed over. No backpay is claimed for periods after December 31, 1978, the date after which Respondent's referral registers show that the pattern of violations ceased. The backpay period for each discriminatee is set forth in Appendix A.

2. The formula to determine the appropriate measure of backpay is prescribed in the Board's Order as enforced. The overall earnings of all applicants, members and nonmembers, are totalled and divided by the total number of applicants to yield gross backpay.

3. Local 480's hiring hall records were used to determine the names of all applicants who registered for work. A list of all applicants who were members of Respondent and who used Respondent's hiring hall during 1976, 1977 and 1978 is attached as Appendix

B. A list of all non-member applicants is attached as Appendix C. An entry of "no reg" indicates that the applicant did not seek work through Respondent's hiring hall during the calendar year; such applicants are excluded from calculations of average earnings.

4. The following applicants constitute a representative sample of their respective membership groups:

| Members | Non-Members |
|---|---|
| Robert J. Krevet | Ronald Cron |
| Willie Marshall | Robert Dailey |
| Rich McConnon | Daniel Dietz |
| Peter Okrasinski | Walter J. Serafin |
| W. Walker | |
| Joseph Zabita | |

5. During the backpay period the individuals comprising the representative sample worked the number of days indicated in columns 1, 2, and 3 of Appendix D.

6. During the backpay period, the non-member applicants had total earnings derived from employment obtained through registration at Respondent's hiring hall as indicated in columns 4, 5, and 6 of Appendix D.

7. Average earnings per day of work is calculated by dividing total earnings of the representative sample by the total number of days worked. Average earnings per day of work are set forth in columns 7, 8 and 9 of Appendix D.

8. Average number of days worked for member applicants and non-member applicants is calculated by dividing the total of all days worked by the number of applicants who worked. The average number of days worked by the individuals comprising the representative sample is set forth in Appendix D on lines 10 and 23.

9. The total number of members and non-members using Respondent's hiring hall during the backpay period is set forth in column 1 of Appendix E.

10. The average gross earnings of applicants is calculated by multiplying the average number of days worked by the average earnings per day of work. Average gross earnings are set forth in Column 2 of Appendix E.

11. Total earnings of members and non-members is calculated by multiplying the number of applicants for employment by average gross earnings. Total earnings are set forth in column 3 of Appendix E.

12. Total gross earnings for all applicants who sought work through Respondent's hiring hall is the total of earnings of members and earnings of non-members. Total gross earnings are set forth in column 3 of Appendix E on lines 6, 16, and 26.

13. Gross backpay is calculated by dividing total gross earnings of all applicants by the total number of applicants for each year. Gross backpay is set forth in column 5 of Appendix E. Adjusted gross backpay is calculated by subtracting the average earnings of non-member applicants from the gross backpay. Adjusted gross backpay is set forth in column 6 of Appendix E.

14. For 1976, quarterly adjusted gross backpay is determined by prorating total adjusted gross backpay on the basis of 80 days in the third quarter and 90 days in the fourth quarter. For 1977 and 1978, quarterly adjusted gross backpay for quarters in which a discriminatee is due backpay for the entire quarter is defined as one-fourth adjusted gross backpay for the year. Quarterly adjusted gross backpay for quarters in which a discriminatee is due backpay for less than the entire quarter is determined by dividing one-fourth of the annual gross backpay by 90,

and multiplying by the number of days for which backpay is due.

15. Calendar quarter adjusted gross backpay is as follows:

| | | |
|---|---|---|
| 1976 | Q3 | $ 790.85 |
| 1976 | Q4 | $ 889.71 |
| 1977 | | $1585.76 |
| 1978 | | $1450.17 |

16. Quarterly net backpay is defined as the difference between quarterly adjusted gross backpay and net interim earnings derived from sources other than referrals obtained through registration at Respondent's hiring hall.

17. It is admitted that the discriminatees had interim earnings as set forth in Appendix F.

18. The total net backpay due the discriminatees, excluding additional benefits (listed below), is the sum of the calendar quarter amounts of net backpay due as set forth in Appendix G.

19. During the backpay period, absent discrimination, employers would have made contributions on employees' behalf to District Council of Ironworkers of Northern New Jersey Fringe Benefit Funds. Such contributions are made to the Pension Fund, Welfare Fund, Annuity Fund, and Vacation Fund according to rates specified in collective bargaining agreements in effect at the time work is performed. Respondent is required under the Board's Order, as enforced, to make contributions to the Fringe Benefit Funds at the contractual rates for the applicable backpay periods.

20. Summarizing the facts and calculations specified above, the obligation of Respondent to make whole the discriminatees under the terms of the Board's Order, as enforced by the Circuit Court, will be discharged by payment to them of the amounts indicated

in Appendix G, plus interest accrued to the date of payment pursuant to said Order, and by making the contributions indicated into the respective fringe benefit funds on their behalf.

PLEASE TAKE NOTICE that on the 16th day of May, 1983, at 9:30 a.m. in Room 1600, at 970 Broad Street, Newark, New Jersey, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Specification at which time you will have the right to appear in person or otherwise and give testimony.

You are further notified that pursuant to Section 102.54 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall, within 15 days from the date of this Specification, file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to the Specification. To the extent that such answer fails to deny allegations of the Specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them.

Signed at Newark, New Jersey this 21st day of December, 1982.

/s/ Arthur Eisenberg
ARTHUR EISENBERG
Regional Director
National Labor
Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

EXHIBIT F

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 22

---

Case No. 22-CB-3432

INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL & ORNAMENTAL
IRONWORKERS, LOCAL 480, AFL-CIO

and

JOHN A. CRANER, ATTORNEY

and

BUILDING CONTRACTORS ASSOCIATION
OF NEW JERSEY
PARTY TO THE CONTRACT

---

## AMENDED BACKPAY SPECIFICATION AND NOTICE OF HEARING

The National Labor Relations Board, having on May 9, 1978, issued an Order in the above-captioned case, directing Respondent Local 480, International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO to make whole Ronald Cron, Robert Dailey, Daniel Dietz, Edward Korab, Walter Serafin, and all other nonmember applicants who were similarly situated for their losses resulting from Respondent's unfair labor practices in violation of Sec-

tion 8(b)(1)(A) and (2) of the Act, the Court of Appeals for the Third Circuit having on June 4, 1979 entered its Judgment enforcing the Board's Order herein, and controversy having arisen over the amount of backpay due under the terms of the Board's Order, the Regional Director of the National Labor Relations Board for Region 22, pursuant to authority duly conferred upon him by the Board, hereby issues this Backpay Specification and alleges that the backpay due under the Board's Order, as enforced by the Court of Appeals for the Third Circuit, is as follows:

1. The backpay period for each discriminatee begins on the first day said discriminatee was denied referral to employment (passed over) in favor of a member of Respondent and runs until the end of that calendar quarter. Thereafter, each discriminatee is due backpay for each subsequent calendar quarter in which a pass-over occurred. The backpay period for each discriminatee ends at the end of the calendar quarter in which the discriminatee was last passed over. No backpay is claimed for periods after December 31, 1978, the date after which Respondent's referral registers show that the pattern of violations ceased. The backpay period for each discriminatee is set forth in Appendix A.

2. The formula to determine the appropriate measure of backpay is prescribed in the Board's Order as enforced. The overall earnings of all applicants, members and nonmembers, are totalled and divided by the total number of applicants to yield gross backpay.

3. Local 480's hiring hall records were used to determine the names of all applicants who registered for work. A list of all journeyman applicants who were members of Respondent and who used Respondent's hiring hall during 1976, 1977 and 1978 is at-

tached as Appendix B. A list of all non-member applicants is attached as Appendix C. An entry of "no reg" indicates that the applicant's name does not appear on Respondent's hiring hall referral register during the calendar year. Such applicants are excluded from calculations of average earnings for the years in which their names do not appear. An entry of "appr" indicates that the applicant was an apprentice during the calendar year. Such applicants are also excluded from calculations of average earnings.

4. Gross backpay is calculated by dividing total gross earnings of all applicants by the total number of applicants for each year. Gross backpay is set forth in Appendix D.

5. For 1976, quarterly gross backpay is determined by prorating total gross backpay on the basis of 80 days in the third quarter and 90 days in the fourth quarter. For 1977 and 1978, quarterly gross backpay for quarters in which a discriminatee is due backpay for the entire quarter is defined as one-fourth gross backpay for the year. Quarterly gross backpay for quarters in which a discriminatee is due backpay for less than the entire quarter is determined by dividing one-fourth of the annual gross backpay by 90, and multiplying by the number of days for which backpay is due. Quarterly gross backpay for each discriminatee is listed in column 1 of Appendices E-1 through E-135.

6. Calendar quarter gross backpay is as follows:

| | | |
|---|---|---|
| 1976 | Q3 | $2676.49 |
| 1976 | Q4 | $3011.05 |
| 1977 | | $2436.44 |
| 1978 | | $3786.68 |

7. Quarterly adjusted gross backpay is defined as the difference between quarterly gross backpay and

earnings derived from employment with employers signatory to a collective bargaining agreement with the District Council of Ironworkers of Northern New Jersey. Such earnings are listed in column 2 of Appendices E-1 through E-131, and are prorated in the same manner as gross backpay. Quarterly adjusted gross backpay is listed in column 3 of Appendices E-1 through E-135.

8. Quarterly net backpay is defined as the difference between quarterly adjusted gross backpay and net interim earnings derived from sources other than employers signatory to a collective bargaining agreement with the District Council.

9. It is admitted that the discriminatees had interim earnings as set forth in column 4 of Appendices E-1 through E-135.

10. The total net backpay due the discriminatees, excluding additional benefits (listed below), is the sum of the calendar quarter amounts of net backpay due as set forth in column 5 of Appendices E-1 through E-135.

11. During the backpay period, absent discrimination, employers would have made contributions on employees' behalf to District Council of Ironworkers of Northern New Jersey Fringe Benefit Funds. Such contributions are made to the Pension Fund, Welfare Fund, Annuity Fund, and Vacation Fund according to rates specified in collective bargaining agreements in effect at the time work is performed. Respondent is required under the Board's Order, as enforced, to make contributions to the Fringe Benefit Funds at the contractual rates for the applicable backpay periods. Such contributions are listed in column 6 through 9 of Appendices E-1 through E-135.

12. Summarizing the facts and calculations specified above, the obligation of Respondent to make whole

the discriminatees under the terms of the Board's Order, as enforced by the Circuit Court, will be discharged by payment to them of the amounts indicated in Appendices E-1 through E-135 plus interest accrued to the date of payment pursuant to said Order, and by making the contributions indicated plus interest accrued to the date of payment into the respective fringe benefit funds on their behalf.

PLEASE TAKE NOTICE that on the 16th day of May, 1983, at 9:30 a.m. in Room 1600, at 970 Broad Street, Newark, New Jersey, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above amended Specification at which time you will have the right to appear in person or otherwise and give testimony.

You are further notified that pursuant to Section 102.54 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall, within 15 days from the date of this amended Specification, file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to the amended Specification. To the extent that such answer fails to deny allegations of the amended Specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them.

Signed at Newark, New Jersey this 11th day of March, 1983.

/s/ Arthur Eisenberg
ARTHUR EISENBERG
Regional Director
National Labor
Relations Board
Region 22
970 Broad Street
Newark, New Jersey 07102

## APPENDIX I

1. Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in pertinent part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him * * *.

2. The relevant provisions of the National Labor Relations Board Rules and Regulations and Statements of Procedure, 29 C.F.R. 101.1 *et seq.*, are as follows:

### BACKPAY PROCEEDINGS

Sec. 102.52 *Initiation of proceedings; issuance of backpay specification; issuance of notice of hearing without backpay specification.*—After the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of backpay due which cannot be resolved without a formal proceeding, the regional

director may issue and serve on all parties a backpay specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 15 days after the service of the specification. In the alternative and at his discretion, the regional director may, under the circumstances specified above, issue and serve on the parties a notice of hearing only, without the backpay specification, the hearing to be held befor an administrative law judge, at a place therein fixed and at a time not less than 15 days after the service of the notice of hearing.

Sec. 102.53 *Contents of backpay specification and of notice of hearing without specification.*

(a) *Contents of backpay specification.*—Where the specification procedure is used, the specification shall specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation as to gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) *Contents of notice of hearing without specification.*—The notice of hearing without specification shall contain, in addition to the time and place of hearing before an administrative law judge, a brief statement of the matters in controversy.

Sec. 102.54 *Answer to specification; no requirement for answer to notice of hearing issued without backpay specification.*

(a) *Filing and service of answer to specification.* —The respondent shall, within 15 days from the service of the specification, if any, file an answer thereto; an original and four copies shall be filed with the

regional director issuing the specification, and a copy thereof shall immediately be served on any other respondent jointly liable.

(b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file an answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If

the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

(d) *Answer to the notice of hearing issued without backpay specification.*—No answer need be filed by respondent to notice of hearing issued without a specification.

Sec. 102.55 *Extension of time for filing answer to specification.*—Upon his own motion or upon proper cause shown by any respondent, the regional director issuing the specification may by written order extend the time within which the answer to the specification shall be filed.

Sec. 102.56 *Extension of date of hearing.*—Upon his own motion or upon proper cause shown, the regional director issuing the specification or notice of hearing without specification may extend the date of hearing.

Sec. 102.57 *Amendment to backpay specification.*—After the issuance of the notice of hearing, but prior to the opening thereof, the regional director may amend the backpay specification and the respondent affected thereby may amend his answer thereto. After the opening of the hearing, the specification and the answer thereto may be amended upon leave of the administrative law judge or of the Board, as the case may be, good cause therefor appearing.

Sec. 102.58 *Withdrawal.*—Any such specification or notice of hearing without specification may be withdrawn before the hearing by the regional director on his own motion.

Sec. 102.59 *Hearing; posthearing procedure.*—After the issuance of a notice of hearing with or without backpay specification, the procedures provided in sections 102.24 to 102.51, inclusive, shall be followed insofar as applicable.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1984 430448 233

NO. 83-1202

Office - Supreme Court, U.S.
FILED
MAR 15 1984
ALEXANDER L. STEVAS
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO,

*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF IN OPPOSITION

THOMAS J. O'NEILL
*Attorney for Respondent, Ironworkers Local 480*
60 Park Place
Newark, New Jersey 07102
(201) 643-6300

*On the Brief:*
JOHN J. MULVIHILL

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

## Question Presented

1. Whether under the totality of the circumstances the Court of Appeals acted properly in amending its previously entered order to exclude from backpay consideration "similarly situated" individuals.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| COUNTER-STATEMENT OF THE CASE | 2 |
| REASONS FOR DENYING THE PETITION | 9 |
| CONCLUSION | 14 |
| APPENDIX: | |
| A—Motion for Partial Relief from Judgment (March 31, 1982) | 1a |
| B—Affidavit of Francis E. Arny in Support of Motion for Modification | 3a |
| C—Motion for Partial Relief from Judgment | 8a |
| D—Affidavit of John J. Mulvihill in Support of Motion of Modification | 10a |

PAGE

## *Table of Authorities*

### Cases Cited

Carpenter Sprinkler Corp. v. NLRB, 605 F2d 60 ..... 11

Frito Lay, Inc. v. NLRB, 585 F2d 62 ..... 12

Goland v. Central Intelligence Agency, 607 F2d 339, cert den. 100 S. Ct. 1312 (1980) ..... 10

NLRB v. Fairview Hospital, 443 F2d 1217 ..... 10

NLRB v. Mastro Plastics Corp., 261 F2d 147 ..... 10

NLRB v. J. H. Rutter-Rex Manufacturing Co., 396 U.S. 258 ..... 9

NLRB v. Seven-Up Bottling Co., 344 U.S. 344 ..... 11

NLRB v. Townhouse TV and Appliance Inc., 531 F2d 826 ..... 11

Republic Steel Corp. v. NLRB, 311 US 7 ..... 11

Universal Camera Corp. v. NLRB, 340 US 474 ..... 14

### Rule Cited

Federal Rules of Civil Procedure:

60(b)(6) ..... 2, 10

NO. 83-1202

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF IN OPPOSITION

Respondent, International Association of Bridge, Structural & Ornamental Ironworkers, Local 480, AFL-CIO ("Local 480"), in response to the National Labor Relations Board's ("Board") petition for a writ of certiorari, respectfully shows as follows:

## Counter-Statement of the Case

The unfair labor practice complaint in this matter was filed by the Board in February, 1977 on behalf of five identified individuals, i.e., Dietz, Dailey, Cron, Szary and Korab, as well as "all other non-member applicants who were similarly situated." Only the five named individuals, however, appeared and participated at the hearing. The Board's decision ruled that discrimination had been practiced by Local 480 in the operation of its job referral system and, accordingly, a broadly based backpay order was issued. This order required Local 480 to make whole the five charging parties, as well as all other "similarly situated" individuals (P.A.27a). Backpay was to be calculated according to a formula whereby the overall earnings of all applicants, members and nonmembers, seeking employment through its referral system would be divided by the total number of ironworkers who worked out of the hiring hall, taking into account the net earnings of the individual discriminatees during the relevant period and providing for the inclusion of interest (P.A.21a-22a). The court of appeals ordered enforcement of the Board's order on May 11, 1979 (P.A.9a-10a).

During the subsequent three year period, the Board made no appreciable headway in the formulation of a backpay specification. Indeed, the Board had not even identified those individuals which it contended fell within the "similarly situated" category, much less engaged in a computation of the monies owed pursuant to the backpay formula.

It was within the above framework that Local 480 filed its first motion, pursuant to the provisions of Federal Rule 60(b)(6), for partial relief from the terms of the Judgment-Order previously entered against it (R.A.1a-2a). Two additional applications for similar relief were

subsequently filed by Local 480; the third application ultimately resulting in the issuance by the Court of Appeals of the order which is the subject of the Board's instant petition for review. The issuance of this order can only be fully understood, therefore, when viewed within the context of the motions and orders that had immediately preceeded it. Accordingly, a brief discussion of the background of each separate application will herein be set forth:

*Modification Motion I—April, 1982*—This application sought relief from the backpay provisions relating to "similarly situated" individuals on the grounds that:

> . . . the inability of the Board to even identify similarly situated individuals during the past approximate three year period has demonstrated this portion of the Order to be unenforceable and its implementation no longer to be in furtherance of the purposes underlying the National Labor Relations Act (R.A.2a).

This application was supported by the affidavit of Francis E. Arny, Business Manager of Local 480, which affidavit (R.A.3a-7a) raised the following considerations:

1. The Board had confirmed that the Local had long ago ceased its discriminatory activity;

2. The Local was fully prepared to meet its backpay obligations to the five charging parties;

3. The Board, however, would accept no payment on behalf of the five named individuals. The Board's reasoning in this regard was based upon the realization that the inclusion of the "similarly situated" individuals would result in a backpay liability which would exceed the Local's ability to pay. Pro-ration of the awards would, thus, be

necessitated. This could only be accomplished when a backpay amount for each individual had been established;

4. No additional individuals aside from the charging parties had contacted the Board seeking to participate in backpay proceedings since the inception of the litigation.

5. The lack of any delineation as to the extent of the local's still undefined and unspecified liability had effectively precluded it from conducting its business affairs in a proper and normal fashion;

6. The Board was still experiencing tremendous difficulties in formulating a "broadly based" backpay specification; and

7. Prompt resolution of this matter was, therefore, being held up on account of unidentified individuals who had expressed no interest during the intervening years in becoming a participant in the proceedings. Thus, the rights of both the charging parties and Local 480 were being prejudiced by the inclusion of "similarly situated" individuals in the backpay remedy.

After consideration of the affidavits and memoranda of law submitted by the parties, both in support of and in opposition to the granting of the requested relief, the court entered an Order dated May 13, 1982 denying Local 480's motion "without prejudice to review such motion after 90 days if the situation is not clarified by then; the present panel to retain jurisdiction" (P.A.8a).

*Modification Motion II—October, 1982*—Local 480 received absolutely no communications from the Board regarding the implementation of a backpay specification after the issuance of the court's May 13, 1982 order. Accordingly, after the passage of more than four months, the Local once again renewed its motion for partial relief from judgment (R.A.8a-9a). In support of this applica-

tion, the Local once again relied upon the previously submitted Arny affidavit, as well as the affidavit of its attorney, John J. Mulvihill (R.A.10a-14a). The Mulvihill affidavit was submitted in response to the Board's previously raised contention that the Local was in some way responsible for the Board's failure to formulate the backpay specification. One of the positions taken by the Board in response to the renewed application was that it had never been made aware of the existence of the court's May 13, 1982 order establishing the 90 day clarification period (P.A.92a).

After consideration of the pleadings submitted, and after hearing oral argument, the court issued an amended order dated December 1, 1982 which modified the existing Judgment-Order by placing "a termination date of December 31, 1982 for entering a formal backpay specification in connection with the proceedings to obtain back pay." (P.A.6a).

*Modification Motion III—March, 1983*—On December 21, 1982 the Board issued a document which purported to be its formal backpay specification (P.A.94a-99a). The specification sought recovery on behalf of 137 individuals of approximately 1.2 million dollars. This figure included backpay, fringe benefit payments and interest. Contrasted with this staggering liability was the relatively minimal backpay amounts alleged by the Board to be due and owing to the five charging parties. The amounts were as follows:

| | |
|---|---|
| Ronald Cron | $1,952 |
| Robert Dailey | 2,413 |
| Daniel Dietz | 1,685 |
| Edward Korab | -0- |
| Walter Serafin | 1,656 |
| | $7,706 |

The specification, itself, was totally deficient in that it failed to comply with either the backpay formula set forth in the Board's Order and Decision in this matter (P.A.21a), or the Board's own rules and regulations governing the issuance of such specifications. Among its deficiencies, the specification failed to contain the following basic information:

(a) the total actual earnings of all local members who were referred out of the Local 480 hiring hall;

(b) the total actual earnings of all non-local members who were referred out of the Local 480 hiring hall;

(c) the average earnings of all ironworkers who were referred out of the Local 480 hiring hall; and

(d) the amount of interim earnings of the alleged discriminatees during the back pay period (P.A.58a-59a).

Instead of the utilization of actual earning figures, the Board substituted the following approach in formulating its specification:

*Local 480 members*—The average earnings figure for local members was arrived at by picking at random the names of six local members. As to these individuals the Board reviewed the referral registers and counted the days from the time the member was referred to work until he next registered for employment. Based upon an *assumption* that the individual was working during this entire period of time, the Board projected earnings based upon the per diem rate contained in the collective bargaining agreement. An average amount of days worked was, thereafter, calculated and that number was then multiplied by the number of local members, ranging in different years from 120 to 147 members, in order to establish the purported total earnings of Local 480 members (P.A.59a).

*Non-Local members*—Since no attempt had been made by the Board to contact any of the alleged 132 "similarly situated" individuals, the Board projected earnings by utilizing wage information secured from four of the five charging parties contending that such an approach constituted a "representative sample" of all non-local job applicants. (P.A.96a). Since only two of these individuals shaped the hiring hall during 1978, however, the earnings figures for the alleged 137 discriminatees was based solely upon the average earnings of only two individuals.

It was readily apparent, therefore, that the Board's specification constituted a device designed primarily to circumvent the court imposed deadline, rather than a meaningful attempt to ascertain the amount of the backpay actually owed. Accordingly, Local 480 filed its third motion for modification seeking termination of the backpay proceedings for failure of the Board to comply with the deadline. Alternative relief, however, was also requested. This alternative relief was requested as follows:

> (b) An order modifying the Judgment-Order dated May 11, 1979 to remove from the backpay requirement "all other nonmember applicants who were similarly situated" on the grounds that the Board's backpay specification is unenforceable because punitive in nature and no longer in furtherance of the principles underlying the passage of the National Labor Relations Act (P.A.54a).

Such alternative relief could now be requested because both the Local and the court had, for the first time, been made aware of the fact that the Board was seeking a backpay recovery in excess of one million dollars. Subsequent to the filing of the Local 480 motion, the Board issued an amended backpay specification (P.A.100a) which

attempted to utilize actual earning figures. This amended specification failed to substantially reduce, however, the total recovery sought by the Board.

Prior to the issuance of the court's order (P.A.1a), the parties began settlement negotiations at the suggestion of Judge Adams. (Pet. 11). The Local agreed to a Board audit of its finances in order that the Board might satisfy itself as to the Local's ability to pay. The Board confirmed that the net worth of the Local was substantially less than $100,000 (Pet. 17). The Board, thereupon, informed the court that it would not enter into settlement discussions, apparently taking the position that it would not settle for anything less than 80% of the total amount claimed.

On July 27, 1983 the court issued its order on the Local 480 application. The order stated as follows:

> 1. Any back pay specifications not made by December 31, 1982 are hereby barred and are not to be considered. See order of court dated December 1, 1982 (P.A.1a);
>
> 2. Payment in full by the Union of any claims asserted on behalf of Ronald Cron, Robert Dailey, Daniel Dietz and Walter Serafin shall be considered compliance with paragraph 1 of this order (P.A. 2a).

The Board subsequently filed a petition for rehearing en banc of the court's order. This petition was denied by order dated August 24, 1983 (P.A.3a-4a). Shortly thereafter, Local 480 forwarded to the Board appropriate checks made payable to the charging parties in full compliance with the provisions of the court's amended order.

**Reasons for Denying the Petition**

It is the Board's primary contention that certification should be granted because the modification order of the Court of Appeals is directly contrary to this Court's decision in *NLRB* v. *J.H. Rutter Rex Manufacturing Co.*, 369 U.S. 258 (1969). In *Rutter Rex,* this Court held that the Court of Appeals had acted improperly in modifying the provisions of a backpay order due to the Board's inordinate delay in issuing its backpay specification. The sole consideration raised by the employer in defense of the Board's application for enforcement was, therefore, "delay". It is respectfully submitted that the instant matter is both factually and legally distinguishable from the *Rutter-Rex* holding.

Initially, it must be recognized that the relief ultimately accorded to Local 480 was the alternative relief requested in its motion, i.e., removal of "similarly situated" individuals from the backpay requirement, rather than the total striking of the specification for failure to meet the court imposed deadline. It should further be understood that the grounds advanced by Local 480 in support of its application for such relief was the unenforceability of the specification due to its punitive nature, not the delay in issuing the specification. The fact that the court of appeals upheld payment to the charging parties in accordance with the December 21, 1982 specification, but struck from the specification all other alleged "similarly situated" individuals, lends credence to this analysis. This is not to say, however, that the delay in issuing the specification and the inherent unworkability of the backpay formula played absolutely no part in the court's ultimate decision. These, as well as other factors, were invariably considered by the court before fashioning the final relief in response to the Local 480 application for modification.

In issuing its order, the Court of Appeals acted properly and in conformity with existing judicial decisions. Courts have long enjoyed the inherent authority to reform final judgments in special situations where strict enforcement could result in extreme hardship, injustice or oppressiveness. *Goland* v. *Central Intelligence Agency,* 607 F2d 339 (D.C.App. 1978), cert. den. 100 S. Ct. 1312 (1980). This common law equitable power was expressly recognized and codified in Rule 60 of the Federal Rules of Civil Procedure which provides as follows in its relevant section:

> (b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons . . . (6) any other reason justifying relief from the operation of the judgment.

The broad language of subdivision (b)(6) establishes, therefore, a residuary of power in the courts to grant relief under circumstances not specifically delineated in the first five clauses of the subdivision. One of the reasons found acceptable by the courts in invoking its modification powers involves the concept of "changed circumstances". Changed circumstances refers to events occurring subsequent to the entrance of an order which make it unfair or oppressive to continue the dictates of the order. In the context of NLRB enforcement orders, the courts have suggested that the appropriate test should be whether subsequent events have demonstrated that enforcement would no longer be in furtherance of the purposes of the Act. *NLRB* v. *Mastro Plastics Corp.,* 261 F2d 147 (2nd Cir. 1958); *NLRB* v. *Fairview Hospital,* 443 F2d 1217 (7th Cir. 1971).

It is well established that a Board order which is confiscatory in nature and not reasonably adapted to the

situation that calls for redress will not be upheld by the courts. *NLRB* v. *Townhouse TV and Appliances, Inc.*, 531 F2d 826 (7th Cir. 1976). Similarly, the Board may not apply a remedy without regard to circumstances which may make its application in a particular situation oppressive. *NLRB* v. *Seven-Up Bottling Co.*, 344 US 344 (1953). This basic principle was enunciated thusly in *Republic Steel Corp.* v. *NLRB*, 311 US 9, 11 (1940):

> We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act.

In making a determination as to the enforceability of a Board order, a relevant factor to be considered is the financial impact that imposition of the order will have upon a particular respondent. In *Carpenter Sprinkler Corp.* v. *NLRB*, 605 F2d 60 (2nd Cir. 1979) the employer, a small Vermont company, argued that the drastic economic consequences of an estimated $388,000 affirmative order rendered the order punitive. In adopting the employer's argument, the court reasoned thusly:

> . . . The Board urges that we refuse to consider the financial impact of its order on the company at this stage, leaving questions of cost to any further proceeding dealing with compliance. We do not accept the position that we are so narrowly bound in our review at this point, and we feel that an evaluation of the costs to the company is relevant in reviewing the appropriateness of the Board's order. (68)

A similar approach was adopted in *NLRB* v. *Townhouse TV and Appliance, Inc., supra*, where the court charac-

terized as punitive, and not remedial, an order requiring the employer to resume trucking operations where the "capital outlay to reacquire trucks, estimated at more than $16,000 by counsel at oral argument, plus costs such as insurance, maintenance, fuel and taxes, will entail considerable burdens to this relatively small company . . ." The economic consequences to an employer was also considered in *Frito-Lay, Inc.* v. *NLRB,* 585 F2d 62 (3rd Cir. 1978), where the court indicated it would not enforce a Board order in the following language:

> By ordering reopening of the plant with backpay to the terminated employees, the Board has ignored this limitation. In argument, Frito-Lay estimated that the cost of awarding backpay to the employees would exceed one million dollars.
>
> Further, there was no dispute by the Board that the plant was being run at an economic loss when it was closed in June, 1975. Yet, the Board would have this plant reopened at an estimated operating loss of several hundred thousand dollars to the company a year. (68)

An application of the above principles to the facts of the instant case discloses the correctness of the Court of Appeals modification order excluding from the backpay requirement "similarly situated" individuals. At the time the court issued its enforcement order in May, 1979 the court was unaware of either the number of individuals comprising the class, or the economic impact that the inclusion of the class would have upon respondent. Once the specification issued approximately 3½ years later, the court was made aware of the fact that the Board was seeking to recover a backpay liability of approximately 1.2 million; a gigantic quantum leap from the $7,700 allegedly owed to the five charging parties.

Additionally, it is crucial to note that the "similarly situated" individuals for which the Board seeks to recover over $1 million did not see fit to file an unfair labor charge; were never contacted by the Board regarding their desire to participate in the backpay proceedings; and are, up to the present time, unaware of the Board's unilateral determination that they are entitled to backpay. Any recovery as far as these individuals are concerned would, thus, constitute a "windfall". The effect of the "windfall" payment to these "similarly situated" individuals would be severe; it would totally bankrupt the local. It is urged that such a result is not within the intendment of the Act.

Prior to the present offense, Local 480 had no history of violating the provisions of the Act. In the instant matter, the local's sole violation was that it referred to work a disproportionate number of its members as "stewards". All other referrals, aside from the "steward" referrals, were found by the Board to be in conformity with the provisions of the Act. The Local long ago discontinued its use of the "steward" referral. The policy of the Act to remedy discriminatory practices has, thus, already been achieved. The continued insistence of the Board, under these circumstances, to press for a $1 million payment to "similarly situated" individuals is unduly harsh, excessive, confiscatory and not reasonably adapted to the situation that calls for redress. The Court of Appeals decision to modify its previously entered order by excluding "similarly situated" individuals from backpay consideration is, therefore, proper and correct under the totality of the circumstances presented in this case.

The Court of Appeals was also correct in not permitting an amended specification after the court imposed December 31, 1982 deadline. To allow such an amendment, which in effect constituted a totally new specification, would have

amounted to the court giving its imprimatur to circumvention of its own order. The Court of Appeals has been entrusted with general supervisory responsibilities over Board decisions and orders. It arrived at its decision in this matter pursuant to its duty to assume that the Board keeps within "reasonable bounds". *Universal Camera Corp.* v. *NLRB*, 340 US 474. The Court of Appeals' decision is correct, and not, therefore, properly a subject for this Court's review.

## CONCLUSION

**For all the reasons expressed above, it is respectfully submitted that the Board's petition for a writ of certiorari be denied.**

Respectfully submitted,

THOMAS J. O'NEILL
*Attorney for Respondent, Ironworkers Local 480*

Dated: March 12, 1984

## APPENDIX A

**Motion for Partial Relief from Judgment (March 31, 1982)**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2014

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

---

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Respondent, International Association of Bridge Structural & Ornamental Ironworkers, AFL-CIO, by its attorneys, Nolan, Bell and Moore, Esqs., moves this Court pursuant to the provisions of Federal Rule 60(b)(6) for partial relief from the terms of final judgment and Order entered against it by this Court dated May 11, 1979. This Judgment Order granted enforcement in its entirety to

an order of the National Labor Relations Board dated May 9, 1978, which included the following back pay provision:

> 2(d) Make whole each of the above-named employees, and all other non-member applicants who were similarly situated, for any loss of earnings they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of this Decision and Order entitled "The Remedy".

Respondent requests relief from the "and all other non-member applicants who were similarly situated" portion of this order on the grounds that inability of the Board to even identify "similarly situated" individuals during the past approximate three year period has demonstrated this portion of the Order to be unenforceable and its implementation no longer to be in furtherance of the purposes underlying the National Labor Relations Act. In support of its motion, Respondent shall rely upon the Affidavit of Francis E. Arny, attached hereto, as well as the Memorandum of Law submitted herewith.

NOLAN, BELL & MOORE
*Attorneys for Respondent*
By: JOHN J. MULVIHILL

Dated: March 31, 1982

## APPENDIX B

**Affidavit of Francis E. Arny in Support of Motion for Modification**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2014

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

---

STATE OF NEW JERSEY,
COUNTY OF UNION, } ss.:

Francis E. Arny, of full age, being duly sworn upon his oath deposes and says:

1. I am presently the Business Manager of Ironworker Local 480 and have held that position since my election in 1972. Prior to that date, I was the Business Agent of the Local since 1968. I have personal knowledge of all the allegations set forth in this affidavit.

*Appendix B*

2. On May 11, 1979, the Court ordered that the application of the National Labor Relations Board ("Board") for enforcement of its order in the within matter be granted. A copy of the Court's Judgment Order is attached hereto as Exhibit "A". The Board's Order in its relevant part provides as follows:

> 2(d) Make whole each of the above-named employees, *and all other non-member applicants who were similarly situated,* for any loss of earnings they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of the Decision and Order entitled, "The Remedy". (emphasis added).

3. A total of five individuals were named in the Board's order, i.e., Daniel Dietz, Robert Dailey, Edward Korab, Walter Serafin and Ronald Cron. Upon information or belief, no other individual who shapes the Local 480 hiring hall has contacted the Board seeking to participate in the back pay recovery.

4. Since the issuance of this Court's Order, May 11, 1979, Local 480 has fully cooperated with the Board in its attempts to implement the Order. On October 9, 1980, Mr. Gregory Burke, a Board compliance officer, reviewed the Local's referral registers and advised that he was satisfied that any discriminatory conduct had ceased as of January 1, 1979. He, therefore, saw no necessity in xeroxing the registers from this period forward, but did take five registers for copying and returned them the next day.

5. Since that time, the Local has received no further communication from the Board as to the identity of those

individuals which it considers falling within the ambit of the "similarly situated" language of the Order. Apparently, the Board has experienced tremendous problems in its attempts to identify those individuals which it contends are "similarly situated".

6. The Board's difficulty in this regard is evidenced by the statements contained in its letter to all charging parties dated August 6, 1981. A copy of this letter, with its attachment containing hypothetical questions, is attached hereto as Exhibit "B". This letter makes clear that the Board, as of August, 1981, had not yet identified those individuals which it considers "similarly situated." The following excerpt, in response to hypothetical question No. 1 on the attachment, makes this abundantly clear:

> Since the decision *requires* that we fix backpay for every out-of-towner who was passed over, we now have to analyze every line of every referral register to determine who was passed over and when. This is not easy, for two reasons. First, we must list and document each passover, so we can prove it later at a backpay hearing if we have to. Second, may ironworkers signed their names differently each time they registered, and we have to determine how many of these "different" names are actually the same person, so that everyone gets the full amount due. (Also, on some lines the handwriting is poor, and it takes time to determine whose name it is.)

7. The Board has not, therefore, made even the initial determination as to the identity of those individuals which it contends were discriminated against. Additionally, the Board has yet to attempt to resolved the second step required for the formulation of a backpay specification, i.e.,

the establishment of an average quarterly wage for all ironworkers working out of the Local's hiring hall. It is submitted that this second step is immeasurably more difficult that the simple identification of individuals required under the first step.

8. One of the direct results of the Board's inability to formulate a backpay specification, is the fact that the five charging parties have been precluded from recovering any monies. The Board has taken the position that no monies can be turned over until such time as all discriminatees have been identified and an average earning established. The Board's position is articulated in its August 6, 1981 letter in response to hypothetical question No. 2 as follows:

> We do not have a choice. The Order says to take the total of *everyone* who worked, and to pay backpay to *all* out-of-towners passed over. We cannot change the Order. Also, if the locals do not have enough money to pay everyone, it will be necessary to know how much is due *in total,* so we can determine how to divide up what is available.

9. Another result of the Board's prolonged delay has been to make it difficult, if not impossible, for the Local to conduct its business in a proper and normal fashion. Absent some delineation as to the extent of this undefined and unspecified liability, the Local has effectively been precluded from making any type of long range plans for future activities.

10. The effect of the inclusion of the "similarly situated" category in the Board's order has been, therefore, to frustrate, and not promote, the purposes of the Act. The Board's failure, after the passage of approximately

three years, to even identify "similarly situated" individuals, indicates that the Order, as presently constituted, is totallly unworkable. The difficulty is implementing the Order has worked to the prejudice of the charging parties in favor of individuals yet to be identified who have expressed no interest during the past three years in becoming a party to these proceedings.

11. The only type violation found by the Board in the within proceedings was the use by the Local of the "steward" designation in its referral procedures. Since the decision, the Local has corrected this problem and has ceased the practice of referring "stewards" out of chronological order. The Local would like nothing better, therefore, than to finally conclude this matter by fulfilling its backpay obligations. The goal cannot be achieved, however, as long as the Board persists in its vain attempts to make whole "similarly situated" individuals.

12. It is respectfully submitted, therefore, that events subsequent to this Court's May 11, 1979 Order have proven that the inclusion of the "similarly situated" backpay provision is not only unworkable, but is also not in furtherance of the purposes of the Act. Modification of the Order to delete the "similarly situated" requirement will result in a speedy resolution of the backpay award to the charging parties and would also allow the Local to resume its normal business operations.

FRANCIS E. ARNY

Sworn and subscribed before
me this 20th day of March,
1982.

JOHN J. MULVIHILL
Attorney at Law of New Jersey

## APPENDIX C

**Motion for Partial Relief from Judgment (September 28, 1982)**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2014

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

---

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Respondent, International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO, by its attorneys, Nolan, Bell and Moore, Esqs., moves this Court pursuant to the provisions of Federal Rule 60(b)(6) for partial relief from the terms of final judgment and Order entered against it by this Court dated May 11, 1979. This Judgment Order granted enforcement in its entirety to an

order of the National Labor Relations Board dated May 9, 1978, which included the following back pay provision:

> 2(d) Make whole each of the above-named employees, and all other non-member applicants who were similarly situated, for any loss of earnings they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of this Decision and Order entitled "The Remedy".

Respondent requests relief from the "and all other non-member applicants who were similarly situated" portion of this order on the grounds that the inability of the Board to even identify "similarly situated" individuals during the past approximate three and one-half year period has demonstrated this portion of the Order to be unenforceable and its implementation no longer to be in furtherance of the purposes underlying the National Labor Relations Act. In support of its motion, Respondent shall rely upon the previously submitted Affidavit of Francis E. Arny, dated March 29, 1982, and the Affidavit of John J. Mulvihill, Esq., attached hereto, as well as the Memorandum of Law submitted herewith.

NOLAN, BELL & MOORE
Attorneys for Respondent
By: JOHN J. MULVIHILL

Dated: September 28, 1982

## APPENDIX D

**Affidavit of John J. Mulvihill, Esq. in Support of Motion for Modification**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2014

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*v.*

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 480, AFL-CIO

---

STATE OF NEW JERSEY, }
COUNTY OF OCEAN, } ss.:

John J. Mulvihill, of full age, being duly sworn upon his oath deposes and says:

1. I am an associate with the firm of Nolan, Bell and Moore, Esqs., attorneys for Respondent, Ironworkers Local 480, in the within matter. I have personal knowledge of all the allegations set forth in this affidavit. This affidavit is made in support of Local 480's motion for partial re-

lief from the terms of the Judgment-Order entered against it on May 11, 1979.

2. On April 21, 1982, an application for similar relief was filed on behalf of Local 480. This motion was denied without prejudice by Order of this Court dated May 13, 1982, in the following language:

> The motion by respondent for partial relief is denied without prejudidce to renew such motion after 90 days if the situation is not clarified by then; the present panel to retain jurisdiction.

A copy of this Order is attached hereto as Exhibit "A".

3. I have received no communication from the Board regarding the implementation of a backpay specification against Local 480 since the issuance of this Court's May 13, 1982 Order. Local 480 is, thus, renewing its motion for partial relief since the situation has not in any manner been "clarified" during the 90 day period following the entry of this Court's Order. Indeed, although the period since the Court order now extends approximately 150 days, Local 480 has not been apprised of any significant activity by the Board in attempting to implement the broad based backpay specification.

4. The Board submitted in opposition to our original motion affidavits of Edward J. Peterson, Compliance Supervisor, and Gregory M. Burke, a Board Field Examiner. These affidavits attempt to explain the reasons why the Board has been unable to implement the backpay provisions of this Court's Judgment Order issued May 11, 1979. The excuses are varied and wide ranging and include an allegation that the Board has been frustrated by Local

480 in its attempt to formulate a backpay specification. This assertion is factually incorrect as the following recital will disclose.

5. Our records disclose that the Board made only two visits to the Local 480 hiring hall during 1979, i.e., August 14, and November 6. A copy of our letter dated January 18, 1980, referring to these two dates, it attached hereto as Exhibit "B". In early 1980, Mr. John Mansfield, a Board field representative, visited the local's hiring hall on several occasions to review the local's referral registers. In February, Mr. Mansfield indicated that his inspection would be concluded "within one or possible two days." A copy of our letter dated February 12, 1980, confirming this statement is attached hereto as Exhibit "C". For some unexplained reason the Board failed to follow through on its representation to complete their review within the estimated two day time period.

6. In October, 1980, Local 480 acceded to the Board's request and allowed the xeroxing of those referral registers of which the Board did not already have a copy. To this date, however, approximately two years later, the local has still not been advised as to the identity of these individuals which the Board contends fall within the "similarly situated" category.

7. In October, 1981, I was invited by Mr. Burke to attend a conference to discuss possible methods of resolving the backpay problem. The meeting was called to attempt to resolve the impasse which had been reached in the Board's efforts to formulate a backpay specification. The possibility of a lump sum payment based upon the financial ability of the local to pay was discussed. The

Board advised that before it would be in a position to advance a settlement figure, it would require some information regarding the financial condition of the local. I subsequently advised Mr. Burke that the local's finances were fully set forth in its annual LM-2 reports filed with the Department of Labor. (A copy of the 1975 Report is attached hereto as Exhibit "D"). Although these reports fully set forth all of the financial data of the local, I further advised that the Board should contact me if additional information or clarification was required.

8. I received no communication from the Board until receipt of a letter dated January 19, 1982. (A copy is attached as Exhibit "E"). This letter inaccurately stated that "it was proposed that the Regional Office take all of the disposable assets of the local in settlement of the amount due . . ." Our lengthy response to this correspondence setting forth our position as to what occurred at the settlement conference is conntained in our letter to the Board dated January 27, 1982. (Copy attached as Exhibit "F"). We received no response from the Board to this letter. Subsequently, we filed our first motion for partial relief from judgment.

9. I am, therefore, submitting this affidavit in support of Local 480's re-application for partial relief from the terms of the Judgment-Order entered against it on May 11, 1979.

JOHN J. MULVIHILL

Sworn and subscribed to
before me this 29th day
of September, 1982.

KATHLEEN SPARROWE
Notary Public of New Jersey
My Commission Expires April 24, 1985